Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

PATRICIA S. CRAVEN,
Petitioner,

v.

UNIVERSITY OF COLORADO HOSPITAL AUTHORITY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a federal court of appeals impermissibly depart from the accepted and usual course of judicial proceedings by deciding an appeal on non-jurisdictional grounds not raised or argued by any of the parties in their appellate briefs?

PARTIES TO THE PROCEEDINGS

Petitioner

Patricia S. Craven is the former Manager of Safety and Risk Management for University Hospital in Denver, Colorado.

Respondent

The University of Colorado Hospital Authority is a body corporate and political subdivision of the State of Colorado. It operates University Hospital in Denver, Colorado.

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Patricia S. Craven respectfully requests that this Court issue a writ of certiorari to review the opinion and judgment entered in this case by the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the court of appeals on the merits is reported at 260 F.3d 1218 (10th Cir. 2001), and is reproduced in App. B at 3a-28a. The rulings of the United States District Court for the District of Colorado on respondent's motions for judgment as a matter of law during the trial in this case are unreported and are reproduced in App. C at 29a-32a. The decision of the court of appeals denying the petition for rehearing and suggestion for rehearing *en banc* is unreported and is reproduced in App. A at 1a-2a.

JURISDICTION

The opinion of the United States Court of Appeals for the Tenth Circuit was issued on August 13, 2001. A timely petition for rehearing and suggestion for rehearing *en banc* was denied by that court on September 12, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, Section 2 of the Constitution of the United States provides, among other things, that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."

The Fifth Amendment to the Constitution of the United States provides, among other things, that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Dr. Patricia Craven filed a civil action against the University of Colorado Hospital Authority (hereinafter, "Authority" or "Hospital"), in which she alleged that the Authority's decision to terminate her employment was made in retaliation for her exercise of her protected free speech rights (App. B at 9a). The Authority decided to terminate the petitioner's employment after and, according to her dismissal letter, because of a telephone conversation she had (*Id.*) with Dr. Ed Hendrick, then the Chief of the Radiological Services Division of the University of Colorado Health Sciences Center (hereinafter, "HSC"), a sister institution. The petitioner also asserted a state-law claim of wrongful discharge in violation of public policy, and state-law claims of breach of an implied contract and promissory estoppel (*Id.*).

The district court granted summary judgment for the Authority on Dr. Craven's public policy claim, and denied summary judgment on her free speech retaliation and contract claims (App. B at 9a-10a). The respondent moved twice at trial for judgment as a matter of law, each time arguing that the petitioner's speech did not implicate any matters of public concern and that its interests in promoting the efficiency of its services outweighed Dr. Craven's interests in speaking on matters of public concern (App. B at 10a). The district court denied both of those motions (*Id.*). The jury returned a verdict in favor of the Authority on both of those claims, and the district court entered judgment in its favor on all of the

petitioner's claims for relief.

The petitioner appealed that judgment to the United States Court of Appeals for the Tenth Circuit. The only grounds asserted in the petitioner's opening brief in that court were that the district court had erred in instructing the jury on the First Amendment retaliation claim (App. D at 50a-59a) and that it had erred in granting summary judgment to the Authority on her public policy claim (App. D at 59a-63a). The Authority responded to those arguments (App. E). It did not contend in its answer brief that the district court should have granted either of its motions for judgment as a matter of law. It did not discuss or cite the Supreme Court's decisions in *Connick v. Myers*, 461 U.S. 138 (1983), or *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). The petitioner did not discuss those motions and did not discuss or cite either *Connick* or *Pickering* in her reply brief (App. F).

The principal ground asserted by the petitioner in support of her claim of instructional error was that the jury instruction that outlined the elements of her First Amendment retaliation claim required her to establish that the respondent "had an official policy or custom which required [her] to report all health and safety concerns associated with her job duties only to a supervisor ...." (App D at 52a-57a). She contended that this element of liability was unnecessary and inappropriate in a case such as this one, in which she claimed that the employment decision and the basis for it were made or approved by a person with final policymaking authority (App. D at 53a-55a).[1]

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[1] *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-81 (1986); *City of St. Louis v. Praprotnick*, 485 U.S. 112, 127 (1998).

The petitioner also claimed instructional error in five other respects (App. D at 57a-58a). One of those arguments was that the instruction in question limited her liability claim just to her one conversation with Dr. Hendrick, and did not include her earlier speech concerning indoor air quality (hereinafter, "IAQ") problems resulting from construction activities immediately adjacent to Hospital wards, the storage and disposal of biohazardous wastes, and other matters (App. D at 57a). The district court had limited that instruction to Dr. Craven's telephone conversation with Dr. Hendrick because it concluded that "that's what she reported" and that that was her "version of what happened" (App. C at 32a).

The court of appeals decided that the district court had erred in denying the respondent's motions for judgment as a matter of law, and that any instructional errors "were harmless and we need not address them" because, it concluded, the petitioner's First Amendment retaliation claim "should never have been submitted to the jury" (App. B at 23a). That court reasoned that the "underlying premise" of the petitioner's objection to the limited scope of the instruction in question was "that the district court erred when it ruled that the telephone call was protected, but that her speech regarding the IAQ problem, the infectious waste room, and other safety matters was not" (App. B at 14a). That court then stated that, "[i]n order to assess the merits of the objection, we must therefore determine whether any or all of the above-referenced speech was protected" (*Id.*).

The court of appeals concluded that Dr. Craven's speech concerning the Hospital's storage and disposal of biohazardous wastes did not involve matters of public concern (App. B at 15a-16a). That court went on to conclude that the *Pickering* balance favored the Authority with respect to both Dr. Craven's speech concerning IAQ problems and

concerning the Hospital's radiation safety officer (App. B at 17a-23a). It held that "of the four categories of speech cited in Dr. Craven's brief, none can provide an adequate basis for her retaliatory discharge claim" (App. B at 23a). It did not discuss the petitioner's argument of instructional error, except in setting forth the standards for review (*see* App. B at 12a-13a, 14a).

REASONS FOR GRANTING THE WRIT

I. The General Rule in the Tenth Circuit and in Other Circuits Is That an Appellate Court Will Not Consider Arguments Not Made in Any of the Parties' Briefs.

It is settled in the Tenth Circuit that arguments not raised in a party's opening brief are waived. *See, e.g., David C. v. Leavitt*, 242 F.3d 1206, 1212 n. 4 (10th Cir. 2001); *Gaines-Tabb v. ICI Explosives, USA, Inc.*, 160 F.3d 613, 624 (10th Cir. 1998); *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 679 (10th Cir. 1998). That court will not allow an appellant to raise new arguments in a reply brief, both because such a practice would be "manifestly unfair to the appellee who, under our rules, has no opportunity for a written response," and because this would "run the risk of an improvident or ill-advised opinion given our dependence as an Article III court on the adversarial process for sharpening the issues for decision." *Headrick v. Rockwell Internat'l Corp.*, 24 F.3d 1272, 1278 (10th Cir. 1994) (citations and internal quotation marks omitted).

Every circuit follows that same rule. *See, e.g., United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) ("Issues adverted to in a perfunctory manner, unaccompanied by some

effort at developed argumentation, are deemed waived."); *Tolbert v. Queens College*, 242 F.3d 58, 75-76 (2d Cir. 2001) (same); *Laborers' Internat'l Union v. Foster Wheeler Corp.*, 26 F.3d 375, 398 (3d Cir. 1994) ("An issue is waived unless a party raises it in its opening brief, and for those purposes a passing reference to an issue ... will not suffice to bring that issue before this court.") (internal quotation marks omitted); *Nealon v. Stone*, 958 F.2d 584, 590 n. 4 (4th Cir. 1992) (argument waived that was not raised below or in any brief in that court); *Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993) (party abandoned arguments by not including them in body of his brief); *Bickel v. Korean Air Lines Co.*, 96 F.3d 151, 153 (6th Cir. 1996) (declining to address issue not raised in party's briefs); *Hoffman v. Caterpillar, Inc.*, 256 F.3d 568, 578 (7th Cir. 2001) (that court "will deem an issue waived where the argument on appeal is undeveloped and not supported with pertinent authority"); *Neb. State Legislative Bd. v. Slater*, 245 F.3d 656, 658 n. 3 (8th Cir. 2001) ("claims not raised in an initial brief are waived, and we generally do not consider issues raised for the first time on appeal in a reply brief"); *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) ("We review only issues which are argued specifically and distinctly in a party's opening brief"); *Hartsfield v. Lemacks*, 50 F.3d 950, 953 (11th Cir. 1995) ("issues that clearly are not designated in the initial brief ordinarily are considered abandoned"); *Terry v. Reno*, 322 U.S. App. D.C. 124, 101 F.3d 1412, 1415 (D.C. Cir. 1996) (party waived issues that were listed in "Statement of Issues" but that were not argued in brief).

This Court generally follows the same rule. It has held repeatedly that it does not decide issues outside the questions presented by a petition for certiorari. *See, e.g., Glover v. United States*, 531 U.S. 198, 205 (2001); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 563 n. 9

(1999); *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 677 n. * (1996); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992). This Court's Rule 14.1(a) provides that "[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court." In addition, this Court's Rule 24.1 prohibits a brief on the merits from "rais[ing] additional questions or chang[ing] the substance of the questions already presented" in the petition. This Court "decides which questions to consider through well-established procedures; allowing the able counsel who argue before us to alter these questions or to devise additional questions at the last minute would thwart this system." *Taylor*, 503 U.S. at 646.

The rule of waiver for non-briefed appellate issues is based on fundamental principles of due process. A court must provide notice before it can grant preclusive effect to an earlier judgment, *Richards v. Jefferson County*, 517 U.S. 793, 797-805 (1996), extinguish an absent class member's cause of action, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985), or garnish a person's wages, *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969), among other things. The core of due process are the rights to notice and a meaningful opportunity to be heard. *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 542 (1985). A party does not, indeed cannot, receive notice of the grounds for an appellate court's decision if that court decides the case on a ground not raised by any of the parties on appeal.

In addition, this rule ensures that judicial decisions are based on the presentation of facts and the articulation of legal disputes that are at the heart of the adversarial process:

> The premise of our adversarial system is that appellate courts do not sit as self-

> directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them. Thus, Rule 28(a) (4) of the Federal Rules of Appellate Procedure requires that the appellant's brief contain "the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on." Failure to enforce this requirement will ultimately deprive us in substantial measure of that assistance of counsel which the system assumes – a deficiency that we can perhaps supply by other means, but not without altering the character of our institution.

Carducci v. Regan, 230 U.S. App. D.C. 80, 714 F.2d 171, 177 (D.C. Cir. 1983).

The standing requirement is based in substantial part on the policy of adjudicating only disputes that are presented through the adversarial process. *Flast v. Cohen*, 392 U.S. 83, 101 (1968). *See also U.F.C.W. Local 751 v. Brown Group*, 517 U.S. 544, 556 (1996) (associational standing); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628-31 (1991) (third-party standing). The mootness doctrine is based on the same principles. *Friends of the Earth, Inc. v. Laidlaw Environmental Svces. (TOC), Inc.*, 528 U.S. 167, 212-13 (2000) (Scalia, J., dissenting). For the same reasons, federal courts are to avoid issuing advisory opinions on abstract propositions of law. *Hall v. Beals*, 396 U.S. 45, 48 (1969) (*per curiam*).

On occasion, this Court has discussed and sometimes decided cases on the basis of arguments not raised by any of the parties. These exceptional cases, *see Heckler v. Campbell*, 461 U.S. 458, 468-69 n. 12 (1989), have involved subsidiary matters encompassed within the issue or issues upon which certiorari was granted and which at least one *amicus* has argued in its brief, *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 243 (1989); involved an issue that was "antecedent" to the issues presented in the petition and that was "ultimately dispositive of the present dispute," *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1989); or concerned the constitutional validity of the statute on which the claim was based, *Continental Ill. Nat'l Bank & Trust Co. v. Chicago, Rock Island & Pac. Ry. Co.*, 294 U.S. 648, 667 (1935).[2]

Those decisions merely demonstrate that, on occasion, this Court feels it necessary to include, in the issues "fairly included" in a petition for writ of certiorari, those that have been argued in this Court or that are subsumed within the issues specifically presented. For example, in *Arcadia*, a case in which the petitioner claimed that § 318 of the Federal Power Act, 16 U.S.C. § 825q, deprived the FERC of jurisdiction to enter a rate order because of an alleged conflict between the authority of that agency and the SEC, this Court decided that a conflict covered by § 318 did not exist in that

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[2] To the extent this Court decided in those cases to review non-subsumed issues that none of the parties and none of the *amici* had briefed, it may have undertaken that review because of its unique role in the federal judicial system to resolve inter-circuit disputes and to provide definitive guidance to the lower federal courts. In addition, due to its limited docket, this Court may need to decide a spectrum of subsidiary questions that otherwise might not arise again in this Court for years, if at all.

case. 498 U.S. at 77-85. In contrast, this Court has refused to consider arguments similar to the grounds upon which the court of appeals in this case based its decision – that a claim that went forward to trial should have been dismissed in pretrial proceedings. *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 43 n. 5 (1998).

II. The Court of Appeals Departed from the Accepted and Usual Course of Judicial Proceedings in This Case.

The court of appeals based its decision on Dr. Craven's First Amendment retaliation claim on the *Connick* and *Pickering* tests (App. B at 14a-23a), even though the Authority had not raised those issues in its answer brief (App. E) and even though Dr. Craven had not discussed or argued them in either her opening brief (App. D) or reply brief (App. F).[3] It attempted to link those issues to Dr. Craven's argument of instructional error through the following reasoning:

> The underlying premise of Plaintiff's objection to the limited scope of Instruction 22 is that the district court erred when it ruled that the telephone call was protected, but that her speech regarding the IAQ problem, the infectious waste room, and other safety matters was not. In order to assess the merits of the objection, we must therefore determine whether any or all of the above-referenced

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[3] The court of appeals noted that the Authority had not filed a cross appeal on those issues, even though it had raised them in the district court (App. B at 14a-15a & n. 7).

> speech was protected. This is a purely legal inquiry, which we conduct on the basis of the trial record, notwithstanding UH's failure to file a cross-appeal on this point.

(App. B at 14a) (citations and footnote omitted).[4]

This reasoning is based on a false premise. The district court's decision on the scope of this instruction was not based on any conclusion that Dr. Craven's speech on other issues was not protected. Instead, the district court limited that instruction to that one telephone call because it believed that limitation was Dr. Craven's "version of what happened" (App. C at 32a).

The court of appeals' reasoning is belied by that court's own analysis and decision. It noted initially that the district court had denied the Authority's motions for judgment as a matter of law, motions that were based in substantial part on *Connick* and *Pickering* (App. B at 10a).[5] It stated in conclusion that Dr. Craven's First Amendment retaliation claim "should never have been submitted to the jury" (App. B at 23a). Either the district court concluded that Dr. Craven's speech on IAQ issues and on the storage and

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[4] The court of appeals cited *Connick*, 461 U.S. at 148 n. 7 & at 150 n. 10) in that paragraph. Both the district court and the court of appeals had concluded in that case that the plaintiff's speech involved a matter of public concern. *Id.* at 142. This Court did not intimate that it or any other court could decide that issue if it had been waived or abandoned by not being briefed in the court of appeals or in this Court.

[5] The court of appeals stated that the district court's ruling on those motions was limited to Dr. Craven's speech concerning the Hospital's radiation safety officer (App. B at 10a).

disposal of biohazardous wastes was protected or it did not decide that issue. In either event, the *Connick* and *Pickering* issues, which neither of the parties had briefed, were not subsumed in the question of whether the district court had committed reversible error by limiting the key First Amendment liability instruction to Dr. Craven's telephone discussion about the Hospital's radiation safety officer.[6]

Even if the court of appeals was justified in reviewing the protected status of Dr. Craven's speech in order to determine that issue, this justification did not apply to the balance of her arguments of instructional error. Dr. Craven's principal contention in that section of her opening brief (App. D at 52a-57a) and four of her five subsidiary points (App. D at 57a-58a) were based only on her claim that the Authority had terminated her employment in retaliation for what she allegedly had said to Dr. Hendrick about the work performance of the Hospital's radiation safety officer.[7] The

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[6] The limited scope of that instruction was not Dr. Craven's principal appellate argument of instructional error. She devoted most of that section of her opening brief to her argument that the district court had erred by refusing to instruct the jury on her theory of the case, that of First Amendment retaliation (App. D at 52a-57a). She devoted only one paragraph to her contention that the district court erred by limiting that instruction to one telephone conversation.

[7] Dr. Craven summarized that telephone call, in her opening brief, as concerning what she understood to be a spill of radioactive iodine on one of the Hospital's wards, the unavailability of the Hospital's radiation safety officer to advise nurses in that ward about the proper and safe procedures for cleaning up that radioactive material, emergency responses to these kinds of situations, and a résumé for that position that she had received by

court of appeals admitted that the district court had concluded that this speech was protected (App. B at 22a n. 9). The *Connick* and *Pickering* tests were not subsumed in Dr. Craven's major argument (App. D at 52a-57a) that the district court had erred by requiring her to prove the existence of a prior policy or practice of restraint of free speech in order to establish *post hoc* unconstitutional retaliation by a person with final policymaking authority.[8]

III. This Court Should Exercise Its Supervisory Authority in This Case.

One of the grounds for granting certiorari is that a court of appeals "has so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's supervisory authority." Sup. Ct. R. 10.1(a)(1). "As the Court of last resort in the federal system, we have supervisory authority and therefore must occasionally perform a pure error-correcting function in federal litigation." *Florida v. Rodriguez*, 469 U.S. 1, 7 (1984) (Stevens, J., dissenting). *See generally* R. Stern, E. Gressman, S. Shapiro & K. Geller, Supreme Court Practice 191-92 (7th ed. 1993).

The court of appeals' use of a non-argued basis to reverse the district court's *Connick* and *Pickering* rulings deprived Dr. Craven of property without due process of law. Whether particular public employee speech touches on matters

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mistake (App. D at 44a).

[8] The grounds upon which the court of appeals decided Dr. Craven's First Amendment claim did not involve that court's subject matter jurisdiction, which that court could have decided on its own motion. *Mansfield, C. & L. M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884).

of public concern and whether the balance of interests favor the employee or the governmental employer are highly fact-specific questions, on which there are both intra-circuit and inter-circuit splits in very similar fact situations.[9] For example, the court of appeals in this case decided that Dr. Craven's speech concerning the storage and disposal of biohazardous waste at the Hospital did not involve a matter of public concern (App. B at 15a-16a). Yet in other cases, the Tenth Circuit has held that public employee speech concerning public health and safety involved matters of public concern. *See, e.g., Lee v. Nicholl*, 197 F.3d 1291, 1296 (10th Cir. 1999) (traffic safety and snow removal at an intersection); *Considine v. Bd. of County Comm'rs*, 910 F.2d 695, 699-700 (10th Cir. 1990) (highway project); *Johnsen v. Independent School Dist. No. 3*, 891 F.2d 1485, 1490 (10th Cir. 1989) (school district's medication policy). That is also the law in other circuits. *See, e.g., Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 353 (4th Cir. 2000) ("Matters relating to public safety are quintessential matters of 'public concern.'"); *Myers v. Hasara*, 226 F.3d 821, 826-27 (7th Cir. 2000) (speech concerning public health inspections); *Kennedy v. Tangipahoa Parish Library Bd. of Control*, 224 F.3d 359, 372-75 (5th Cir. 2000) (speech concerning public safety at library).

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[9] One commentator has claimed that, in this area, this "Court has fashioned doctrine that is vague" and "internally inconsistent." T. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 SO. CAL. L. REV. 1, 25 (1987). Another has noted that "lower federal courts have been anything but consistent in their determination of what speech is protected" under *Connick*. S. Allred, *From* Connick *to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L. J. 43, 75 (1988).

The *Pickering* balancing test is even more fact-specific. While a public employer can rely on "predictions of harm ... to justify restriction of employee speech," *Umbehr*, 518 U.S. at 676, the employer must make a reasonable prediction, based on specific evidence, that the statement would "impair[ ] discipline by superiors or harmony among co-workers, ha[ve] a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or "impede[ ] the performance of the speaker's duties or interfere[ ] with the regular operation of the enterprise." *Rankin v. McPherson*, 483 U.S. 378, 388 (1987). *See also Gardetto v. Mason*, 100 F.3d 803, 811 (10th Cir. 1996) (governmental employer cannot "rely on purely speculative allegations that certain statements caused or will cause disruption"); *Andersen v. McCotter*, 205 F.3d 1214, 1218 (10th Cir. 2000) ("the government must articulate specific concerns about the impact of an employee's speech, and those concerns must be reasonable and formed in good faith") (citations omitted).

The court of appeals based its holding that Dr. Craven's speech concerning biohazardous waste at the Hospital did not involve a matter of public concern on its conclusion that she "was obviously speaking as an employee – not a citizen," at least in part because she had described photographs of leaking bags of such waste as "really gross" (App. B at 15a-16a). That court also held that the *Pickering* balancing test favored the employer in connection with her discussion with an HSC employee concerning the work performance of the Hospital's radiation safety officer – an HSC employee who did that work on a contract basis for the Hospital – based on predictions of future problems made by Dr. Craven's immediate supervisor (App. B at 20a-23a).

Dr. Craven presented no arguments on either of those issues in her opening brief (App. D) or her reply brief (App. F). She summarized the facts surrounding her speech on biohazardous waste and the radiation safety officer in the "Statement of the Case" section of her opening brief (App. D at 40a-45a), but presented no case authority or argument as to why those facts supported the district court's denial of the Authority's motions for judgment as a matter of law. She did not do so in her opening brief because the Authority had not raised those issues in a cross-appeal. She did not address those issues in her reply brief for the same reason – the Authority had presented no argument on those issues, and had not even cited *Connick* or *Pickering*, in its answer brief.[10]

In addition, the court of appeals' decision effectively constituted an advisory opinion on the *Connick* and *Pickering* issues on which that decision was based. The Authority, for reasons known best to itself, decided not to raise those issues on appeal. It is not the purpose of the courts in this country to decide issues that the parties have chosen not to assert, unless those issues involve the very power of a court to decide a particular controversy. *Carducci*, 714 F.2d at 177. The technique used by the court of appeals in this case might be appropriate in a civil-law system, in which judges play a far more activist role than is true in the United States, but it is foreign to the American judicial system.

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[10] One could imagine an appellate system in which a prudent party would argue every possible ground upon which the court of appeals could base its decision, whether or not any of those grounds had been contained in a notice of appeal or cross-appeal and whether or not they had been argued in the opposing party's brief(s). Such tactics would require a court of appeals to wade through a myriad of irrelevant issues and arguments presented precisely to avoid the kind of decision made in this case.

But the court of appeals' decision does not implicate merely the parties to this case and merely this dispute. According to a recent empirical study, the reversal rate in federal courts of appeals for defense trial victories in employment discrimination cases is only 5.8%, the lowest reversal rate for any category of cases other than prisoner habeas corpus trials. T. Eisenberg and S. J. Schwab, *Double Standard on Appeal: An Empirical Analysis of Employment Discrimination Cases in the U.S. Courts of Appeals*, p. 2, http://www.findjustice.com/ms/pdf/double-standard.PDF (accessed Dec. 7, 2001). The reversal rate for plaintiff trial victories is 43.61%, the highest reversal rate for any category of cases other than "other civil rights cases." *Id.*[11] The 37.81% gap between plaintiffs' and defendants' reversal rates is greater for employment discrimination cases than for any other category of cases for which the Administrative Office of the United States Courts maintains statistics.[12]

These statistics suggest that many judges in the courts of appeals are applying a results-based approach in employment litigation, one in which different substantive and procedural standards exist based on which side prevailed in the district court. They suggest that many judges in those courts search for reasons to reverse plaintiff trial victories and to affirm defense trial victories. As the authors of that study conclude, this gap "raises the specter that appellate courts have a double standard for employment discrimination cases,

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[11] The statistics for "other civil rights cases," which would include Dr. Craven's First Amendment claim, is 48.04% for plaintiff trial victories and 13.86% for defense trial victories. *Id.*, pp. 8-9.

[12] The gap for "other civil rights cases" is almost as large – 34.18%.

harshly criticizing employee victories at trial while gazing benignly at employer victories at trial." *Id.*, p. 6.

The court of appeals' use of non-argued, non-briefed issues enabled it to affirm the result below. Had it not done so, it might have – and Dr. Craven submits it would have – reversed the district court on the basis of the argument she and the Authority did brief.[13] This decision therefore is an example of a more pervasive and serious pattern of results- and party-oriented appellate decisions. This Court should exercise its supervisory power in order to review and to reverse that decision.

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[13] The court of appeals agreed that a party is entitled to an instruction on her theory of the case if she has offered sufficient evidence for the jury to find in her favor (App. B at 12a-13a). It agreed that Dr. Craven explained repeatedly at trial that she was not attempting to show the existence of a pre-existing policy that restricted her rights of free speech, but rather that she had been terminated in retaliation for protected speech (App. B at 21a n. 9). It also agreed that there was no evidence that anyone ever expressly prohibited her from speaking with other people in addition to Ms. Cashman (App. B at 8a n. 3). Had the court of appeals not decided this case on the basis of *Connick* and *Pickering*, it appears it would have been compelled to reverse the jury's verdict and remand this case for a new trial based upon proper jury instructions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 99-1519
(D.C. No. 97-D-258)

Filed, September 12, 2001

PATRICIA CRAVEN,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
UNIVERSITY OF COLORADO HOSPITAL AUTHORITY,	)
Defendant-Appellee.	)
	)

Before **TACHA, KELLY**, Circuit Judges, and **LUNGSTRUM***, District Judge.

ORDER

Appellant's petition for rehearing is denied.

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* The Honorable John W. Lungstrum, District Judge, United States Court for the District of Kansas, sitting by designation.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

PATRICK FISHER,
Clerk of Court

By:_____
Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 99-1519

August 13, 2001, Filed

PATRICIA CRAVEN, *Plaintiff-Appellant*,

vs.

UNIVERSITY OF COLORADO HOSPITAL AUTHORITY, *Defendant-Appellee*.

Appeal from
The United States District Court
For the District of Colorado
(D.C. No. 97-D-258)
- D.C. Judge Wiley Y. Daniel

JUDGES:
Before TACHA, KELLY, Circuit Judges, and LUNGSTRUM*, District Judge.

* The Honorable John W. Lungstrum, District Judge, United States District Court for the District of Kansas, sitting by designation.

OPINION

KELLY, Circuit Judge.

Dr. Patricia Craven filed this action against the University of Colorado Hospital Authority ("UH" or "the hospital"), asserting: (1) a federal claim under *28 U.S.C. § 1983* for retaliatory discharge in violation of the First and Fourteenth Amendments ("retaliatory discharge claim" or "§1983 claim"); (2) a pendent state claim for wrongful discharge in violation of public policy ("public policy claim" or "pendent state claim"); and (3) a second pendent state claim for breach of implied contract. The court granted summary judgment for UH on Dr. Craven's public policy claim; the others were tried to a jury, which returned a verdict for UH on both claims. The district court denied Plaintiff's Motion for a New Trial or, in the Alternative, to Amend or Alter the Judgment ("Rule 59 Motion"), and she appeals only as to the § 1983 and public policy claims. For the reasons stated below, we affirm.

Background

From March 21 through November 8, 1994, Dr. Craven was employed by UH as the Manager of Safety and Risk Management. IV Aplt. App. 1149.[1] In that capacity, she

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[1] Plaintiff's initial and supplemental appendices, both filed June 5, 2000, are cited herein as "I Aplt. App." and "II Aplt. App.", respectively. Her second supplemental appendix, filed August 29, 2000, is cited as "III Aplt. App." Plaintiff's third supplemental appendix, filed June 4, 2001, and erroneously titled "Second Supplemental Appendix," is cited as "IV Aplt. App."

was responsible for "assessing, developing, implementing, and monitoring the effectiveness of safety, security, and risk management programs for University Hospital." II Aplt. App. 1. The plaintiff became involved in a number of issues during her tenure at UH. For the purpose of this appeal, her involvement with problems relating to internal air quality, the infectious waste room, and radiation safety are the most significant.

I. Internal Air Quality

Almost immediately upon assuming her position at UH, the plaintiff became concerned about fumes emissions from a construction project in the Barbara Davis Center, which was adjacent to the hospital. The Barbara Davis Center was part of the University of Colorado's Health Science Center ("HSC"), a separate but affiliated entity of UH. IV Aplt. App. 605. Fumes were seeping into UH's ventilation system, causing internal air quality ("IAQ") problems within the hospital. The record shows that Dr. Craven's approach to the IAQ problem was confrontational and inflexible, and that she was consistently demeaning to HSC and other project personnel. After an early meeting with project personnel, the plaintiff circulated a memorandum to all affected areas of the hospital and to several high level officials at UH and HSC, reporting her conclusion that the fumes must be halted immediately. She did not consult her then-supervisor, Dr. Ann Jones, before circulating the memorandum. A few weeks later, the plaintiff invited ten to fifteen angry hospital employees to another meeting with project personnel. The record contains overwhelming evidence that Plaintiff's conduct at that meeting was abrasive and uncooperative. *E.g.*, *id.* at 200-03, 620-22, 664, 1110-12. According to one

attendee, the "meeting turned into havoc" when Dr. Craven and the hospital employees began "chanting[:] Who wants to shut them down, let's take a vote, who wants to shut them down." *Id.* at 664. As a result of these and other incidents, the plaintiff was repeatedly advised to develop a more effective problem-solving approach. *E.g., id.* at 1109 (5/24/94 letter); *id.* at 1130 (5/28/94 e-mail); *id.* at 1105 (6/1/94 letter);[2] *id.* at 1004-05 (6/4/94 e-mail).

II. Infectious Waste Room

By July 1994, Dr. Craven had become aware that "the refrigerated infectious waste room on the dock [was] being improperly used[,] resulting in an increased risk of blood borne pathogen exposure." Id. at 1017. In addition to reporting to the safety committee and consulting with

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[2] Although the June 1 letter included a directive that Dr. Craven "direct all comments about the safety of the Hospital to me as your immediate supervisor," IV Aplt. App. 1106, the record indicates that this directive was subsequently modified or withdrawn as impracticable. See id. at 224-26 (testimony of Dr. Craven, describing meeting on or about June 29 with Ruth Sens, Dr. Jones, and Donna Koeppel, a human resources representative, about the plaintiff's upcoming transfer to Ms. Sens' department, during which Ms. Koeppel had informed the plaintiff that after discussing the June 1 letter, she and both supervisors had agreed that "it would have been impossible for [Dr. Craven] to tell [Dr. Jones] even one-tenth of everything that was going on in safety," and that the June 1 directive "was to be disregarded"); id. at 729-30 (testimony of Dr. Jones that she never intended to prevent Dr. Craven from making safety-related comments to others in the hospital, only to require that the plaintiff keep her immediate supervisor informed of those concerns).

appropriate hospital personnel to remedy the problem, id. at 274, Dr. Craven and her staff took a number of photographs to be used in a presentation to the hospital's management council at their monthly meeting in August. Id. at 275-76, 399. Her then-supervisor, Ruth Sens, advised against the presentation on the grounds that given the management council's inability to solve the problem, the presentation "would have been a complete waste of time and cause nothing but stirring the group up." *Id.* at 549. Although plaintiff was allowed to compile a poster display, stand with it outside the meeting, and answer various managers' questions as they entered or left the meeting, *id.* at 277, 400, she was ultimately dissatisfied with the arrangement: "I wanted to present [the problem] to everyone, not just people that had the time to stop and talk." *Id.* at 278.

III. Radiation Safety Officer

Finally, Dr. Craven also clashed with her supervisors regarding the hospital's Radiation Safety Officer ("RSO"), Dr. Tim Johnson. In addition to her concerns about Dr. Johnson's performance, *e.g.*, *id.* at 294, 550-51, 1104, the plaintiff disagreed with the placement of the RSO position in the hospital's overall organizational structure. *Id.* at 398-99, 871-72. Plaintiff was advised to express these concerns to Joyce Cashman - her second-line supervisor and the hospital's then-Chief Operating Officer. *Id.* at 733-34. A few days later, Dr. Craven called Dr. Ed Hendrick, then-Chief of HSC's Radiological Sciences Division, to discuss her concerns about

the RSO.[3] *Id.* at 306-11. Dr. Craven told Dr. Hendrick that nurses had been unable to reach Dr. Johnson to respond to a radioactive iodine spill in a chemotherapy patient's room. The plaintiff noted that another employee had responded to the incident, but expressed concern as to who should be called upon in the future.

On November 3, 1994, Ms. Sens posted a note on Dr. Craven's door, informing her that her "communications with Ed Hendrick[]" had caused "major problems . . . between UH Administration and the Health Sciences Center" and requesting "copies of all notes, E-Mails, and the context of all phone messages that you have had with [Dr. Hendrick] concerning the role of the RSO." *Id.* at 1114. Plaintiff responded in writing, id. at 1115, and met with Ms. Sens the following day. After initially placing Dr. Craven on leave, Ms. Sens terminated Plaintiff's employment on November 8,

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[3] There is no evidence that anyone ever expressly prohibited Dr. Craven from speaking with other people in addition to Ms. Cashman. Thus, UH's claim that Dr. Craven's telephone call to Dr. Hendrick constituted an act of direct insubordination is not supported by the evidence. Nonetheless, unless Dr. Craven was discharged in retaliation for engaging in protected speech activities, "a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Connick v. Myers,* 461 U.S. 138, 147, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983); see also *id.* at 146 ("Government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Ordinary dismissals from government service . . . are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable.") (citations omitted).

1994, due to her "lack of professional behavior and insubordination." *Id.* at 1102. The termination letter described Dr. Craven's conversation with Dr. Hendrick as "extremely inappropriate" and "in direct conflict with the information you [had] received from Joyce Cashman, Vice President of Operations, telling you to address issues regarding the radiation safety officer directly to her." *Id.*; *see supra*, note 3. Plaintiff's internal appeal was unsuccessful. *Id.* at 1051, 1116-19.

Procedural History

This action was originally filed in state court. In her complaint, Dr. Craven alleged state claims for breach of implied contract and wrongful discharge in violation of public policy, as well as a federal claim for retaliatory discharge in violation of the First and Fourteenth Amendments.[4] I Aplt. App. 1-6. After removing the case to federal court, UH moved for summary judgment as to each claim for relief. *Id.* at 12-13. With respect to Plaintiff's §1983 claim, UH argued, inter alia, that the speech for which Dr. Craven was allegedly terminated did not touch on matters of public concern, *id.* at 39-41, and that UH's interests in maintaining an efficient workplace - specifically, in maintaining collegial relations with HSC and its employees - outweighed Dr. Craven's interests in engaging in the speech at issue. *Id.* at 41-43, 149-51. Although the record before us does not contain the

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[4] The complaint contained allegations as to her speech regarding internal air quality and radiation safety, but not as to infectious waste. I Aplt. App. 2-3, PP 7, 9-11. Her third claim for relief did not specify the speech upon which her retaliatory discharge claim was premised. *Id.* at 4-5.

complete transcript of the hearing on that motion, it appears that UH's only successful argument on summary judgment was its claim of immunity under the Colorado Governmental Immunity Act ("CGIA") with respect to the state tort claim. *Id.* at 154-58. Thus, a jury trial was held on the implied contract and §1983 claims.

At the close of Dr. Craven's case and again at the close of all the evidence, UH moved for judgment as a matter of law under Rule 50(a) of the Federal Rules of Civil Procedure. IV Aplt. App. 504-27, 876-79. In both motions, the hospital's primary contention was that the speech upon which Plaintiff's §1983 claim was premised could not legally support a retaliatory discharge claim. As in its motion for summary judgment, UH argued that Dr. Craven's speech did not relate to matters of public concern and that UH's interests, as an employer, in maintaining an efficient workplace outweighed her interests, as a citizen, in speaking out as she did. *Id.* at 504-05, 517-22, 877. The court rejected both motions, but limited its ruling as to the protected status of Plaintiff's speech to her telephone call to Dr. Hendrick. *Id.* at 518, 520-21, 523-24, 878-79. Both claims were then submitted to the jury, which returned a general verdict for the defendant on each theory. *Id.* at 1170-71.

On appeal, Plaintiff challenges the jury's verdict on her §1983 claim on the basis of six alleged errors in Jury Instruction No. 22.

Discussion

I. Federal Claim: Retaliatory Discharge in Violation of First and Fourteenth Amendments

An individual public employer is liable for retaliatory discharge when he terminates an employee because she engaged in protected speech. *Lybrook v. Members of Farmington Mun. Schools Bd. of Educ.*, 232 F.3d 1334, 1338 (10th Cir. 2000). If the court determines that the speech at issue was not protected, the defendant is entitled to judgment as a matter of law.[5] If the speech was protected, the claim is then submitted to the jury, which must decide whether that speech "was a substantial or motivating factor in the termination," *Bd. of County Comm'rs, Wabaunsee County, Kan. v. Umbehr*, 518 U.S. 668, 675, 135 L. Ed. 2d 843, 116 S. Ct. 2342 (1996), and if so, whether the employer "would have taken the same action even in the absence of the protected" speech. *Id.* (citing *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977)). If the jury resolves the foregoing causation issues in the employee's favor, the individual who made the termination decision may be liable for damages. *Id.*

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[5] A determination that speech is "unprotected" in the context of a retaliatory discharge claim does not mean that the speech "is totally beyond the protection of the First Amendment. . . . We in no sense suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the state can prohibit and punish such expression by all persons in its jurisdiction." *Connick*, 461 U.S. at 147 (citations omitted).

Because the mere fact "that a plaintiff has suffered a deprivation of federal rights at the hands of a [public] employee will not alone permit an inference of [governmental] culpability and causation," *Bd. of County Comm'rs of Bryan County, Okla. v. Brown*, 520 U.S. 397, 406-07, 137 L. Ed. 2d 626, 117 S. Ct. 1382 (1997), a plaintiff who seeks to reach beyond an individual defendant to the employer - as a public entity - must also show that the constitutional violation is attributable to that entity. *See, e.g., City of St. Louis v. Praprotnik*, 485 U.S. 112, 121-23, 99 L. Ed. 2d 107, 108 S. Ct. 915 (1988) (plurality opinion); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-83 & n.12, 89 L. Ed. 2d 452, 106 S. Ct. 1292 (1986) (plurality opinion); *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 694, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978).

We begin our analysis with the plaintiff's most fundamental objection: that the district court refused to instruct the jury on her theory of the case.[6] *See FDIC v.*

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[6] In pertinent part, the challenged instruction, No. 22, read as follows:

> In order for the Plaintiff ". . . to recover from the Defendant . . . on her claim of violation of the Plaintiff's constitutional right to freedom of speech, you must find [that] . . . :
>
> (1) The Plaintiff reported to Dr. Hendrick substantial concerns she had regarding a radiation spill at 8 North of University Hospital, how that spill was handled, its adverse impact on patient care and overall hospital safety, and the

Schuchmann, 235 F.3d 1217, 1222 (10th Cir. 2000) (recognizing that "a party is entitled to an instruction on [her] theory of the case . . . if he has offered sufficient evidence for the jury to find in his favor") (internal quotations and citations omitted). Specifically, Plaintiff claims that Instruction 22 erroneously:

> limited the scope of expressive activities on which [her] First Amendment retaliation claim was based just to her one telephone conversation with Dr. Hendrick. That was not the theory of Dr. Craven's case. She claimed retaliation based not only on that [1] one conversation, but also upon her earlier speech in connection with [2] indoor air quality problems resulting from construction activities at the Barbara Davis Center, [3] the storage

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> unavailability of the Radiation Safety Officer to attend to such emergencies;
>
> (2) The Defendant terminated the Plaintiff following this contact with Dr. Hendrick;
>
> (3) The Plaintiff's expression of her views to Dr. Hendrick on the issues specified in paragraph (1) above was a substantial or motivating factor in the Defendant's decision to terminate the Plaintiff;
>
> * * *

I Aplt. App. 362.

> and disposal of bio-hazardous waste, and [4] other matters.

Aplt. Br. at 16-17 (emphasis added). Because Dr. Craven raised this objection to the trial court before the jury retired, see IV Aplt. App. 818, our review is de novo. *Karnes v. SCI Colo. Funeral Serv., Inc.*, 162 F.3d 1077, 1079 (10th Cir. 1998); *see also* Fed. R. Civ. P. 51. In de novo review, we consider the "instructions in their entirety and reverse only if we determine that the error was prejudicial in light of the record as a whole." *Giron v. Corrections Corp. of Am.*, 191 F.3d 1281, 1287 (10th Cir. 1999).

The underlying premise of Plaintiff's objection to the limited scope of Instruction 22 is that the district court erred when it ruled that the telephone call was protected, but that her speech regarding the IAQ problem, the infectious waste room, and other safety matters was not. See IV Aplt. App. 520, 523-24, 878-79. In order to assess the merits of the objection, we must therefore determine whether any or all of the above-referenced speech was protected. Cf. *Connick*, 461 U.S. at 150 n.10 (noting that courts are obligated to "examine . . . the statements in issue and the circumstances under which they are made to see whether or not they . . . are of a character which the principles of the First Amendment . . . protect," and therefore "cannot avoid making an independent constitutional judgment on the facts of the case") (internal quotations and citations omitted, first omission in original). This is a purely legal inquiry, see *id.* at 148 n.7, which we conduct on the basis of the trial record, notwithstanding UH's

failure to file a cross-appeal on this point.[7] *See Koch v. City of Hutchinson,* 847 F.2d 1436, 1441 n.14 (10th Cir. 1988) (en banc).

Of the four categories of speech upon which Plaintiff seeks to base her §1983 claim, we must reject two at the outset. First, Dr. Craven's allegation that she was terminated in retaliation for her speech on "other matters" is patently inadequate. *See* Fed. R. App. P. 28(a)(9)(A). It is the place of counsel, not the Court of Appeals, to identify the specific instances of speech upon which the plaintiff seeks to base her claim. "We will not manufacture arguments for an appellant, and a bare assertion does not preserve a claim, particularly when, as here, a host of other issues are presented for review." *Entertainment Research Group, Inc. v. Genesis Creative Group, Inc.*, 122 F.3d 1211, 1217 (9th Cir. 1997); *see also United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (per curiam) ("Judges are not like pigs, hunting for truffles buried in briefs.").

Second, the plaintiff's reliance on her speech concerning the infectious waste room is misplaced. In any retaliatory discharge case, the threshold inquiry is whether the speech at issue involved a matter of public concern. *Connick,* 461 U.S. at 146-47. Although it is not entirely clear from Plaintiff's brief, she appears to argue that she was terminated, in part, for the proposal she made to Ms. Sens regarding a presentation to the management council about "the storage and

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[7] Notably, UH has contested the protected status of the speech at issue throughout the course of this litigation. I Aplt. App. 39-43, 149-51 (Mot. for Summ. J.); IV Aplt. App. 504-05, 517-22 (first Rule 50(a) Mot.); *id.* at 877 (second Rule 50(a) Mot.).

disposal of bio-hazardous waste." Aplt. Br. at 17. Although it is well-settled that a public employee need not "spread [her] views before the public" in order to pursue a claim for retaliatory discharge, *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415-16, 58 L. Ed. 2d 619, 99 S. Ct. 693 (1979), it is equally well-settled that "in deciding whether a particular statement involves a matter of public concern, the fundamental inquiry is whether the plaintiff speaks as an employee or as a citizen." *David v. City & County of Denver*, 101 F.3d 1344, 1355 (10th Cir. 1997) (citing *Connick*, 461 U.S. at 147). In consulting with Ms. Sens regarding the propriety of presenting certain photographs to a group of managers with no direct responsibility for the photographs' subject matter, Plaintiff was obviously speaking as an employee - not as a citizen. *Id.* at 277, 549; *see also id.* at 277 (testimony of Dr. Craven, describing photographs as "really gross"). The Supreme Court has firmly rejected the view that "all matters which transpire within a government office are of public concern," noting that such a presumption "would mean that virtually every remark . . . would plant the seed of a constitutional case." *Connick*, 461 U.S. at 149. This is not the law. "The First Amendment does not require a public office to be run as a roundtable for employee complaints over [such] internal office affairs" as the proper forum and composition for a presentation on infectious waste.[8] n8 *Id.*

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[8] To the extent Plaintiff's argument is based on the poster display, we reject it as well. The record before us contains no evidence that anyone with the authority to terminate Dr. Craven ever saw the display.

Strictly for the sake of analysis, we assume without deciding that Dr. Craven's speech regarding internal air quality and radiation safety did involve matters of public concern, and we proceed to the second component of our inquiry: whether Dr. Craven's interests, "as a citizen, in commenting upon matters of public concern" outweigh "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968). We have held that the balance of interests may favor the employer when "some restriction is necessary to . . . insure effective performance by the employee." *Gardetto v. Mason,* 100 F.3d 803, 815 (10th Cir. 1996) (internal quotations and citations omitted). Relevant considerations include: "whether the [employee's speech] impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Rankin v. McPherson,* 483 U.S. 378, 388, 97 L. Ed. 2d 315, 107 S. Ct. 2891 (1987) (citing *Pickering,* 391 U.S. at 570-73).

Because "the government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer," *Umbehr,* 518 U.S. at 676 (quoting *Waters v. Churchill*, 511 U.S. 661, 675, 128 L. Ed. 2d 686, 114 S. Ct. 1878 (1994) (plurality opinion)), courts have "consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify

restrictions on the speech of the public at large." *Id.* (quoting *Waters,* 511 U.S. at 673*)*. The employer cannot, however, "rely on purely speculative allegations that certain statements caused or will cause disruption . . . ." *Gardetto,* 100 F.3d at 815. "Instead, the government must articulate specific concerns about the impact of an employee's speech, and those concerns must be reasonable and formed in good faith." *Andersen v. McCotter,* 205 F.3d 1214, 1218 (10th Cir. 2000) (citations omitted). The government need not "allow events to unfold to the extent that the disruption of the [operation] and the destruction of working relationships is manifest . . . ." *Connick,* 461 U.S. at 152; accord *Moore v. City of Wynnewood,* 57 F.3d 924, 934 (10th Cir. 1995) (noting that employer need not "wait for speech actually to disrupt core operations before taking action"). With these legal standards in mind, we turn to the speech at issue.

A. Internal Air Quality

Plaintiff's speech regarding the IAQ problem had a significantly adverse impact on her relationship with various HSC personnel involved in the Barbara Davis Center construction project. Because UH and HSC have, in many senses, a "common mission," it is "extremely important" that employees of both institutions maintain "good collegial relationships" and "respect and trust each other." IV Aplt. App. 736 (testimony of Ms. Cashman). Negative relationships between UH and HSC employees create "a lot of tension. . . [and] distrust," and have an adverse effect on the institutions' abilities to resolve problems. *Id.* at 737. With respect to the IAQ problem, it was particularly important for Dr. Craven to have a comfortable and collegial relationship with John Allison, HSC's project manager for the Barbara Davis Center,

as well as the other HSC employees and contractors involved. Dr. Craven made no attempt to foster such a relationship. In fact, it appears that she went out of her way to antagonize Mr. Allison and his team, first by copying a memorandum that concerned him directly to his supervisor and other high level officials, *id.* at 980, then by bringing angry staff members to a meeting at which she was rude and disrespectful to her HSC colleagues, eventually becoming so emotional that she had to withdraw from participating in the meeting in order to collect herself. *Id.* at 203 (testimony of Dr. Craven).

As a result, the colleagues with whom the plaintiff was supposed to be working in harmony to resolve problems and further a common goal came to view her as "snide," "abrasive," "unprofessional," "unwilling to help," "degrading," "nonrespectful," *id.* at 620-22 (testimony of Mr. Allison), "completely inappropriate," "cynical," "argumentative," "uncooperative," incorporating "vigilante-ism," *id.* at 1110-12 (5/19/94 e-mail from Mr. Allison to Mr. Pauline), and tending to create "havoc". *Id.* at 664 (testimony of Mr. Kohler). Dr. Jones expressed her concerns about Dr. Craven's approach to the IAQ problem on numerous occasions. *Id.* at 1108-09 (5/24/94 letter, advising the plaintiff "to slow down and think clearly," to be more sensitive to "the appropriate manner in dealing with patients, staff and faculty," to employ procedures that would "keep people calm rather than contribute to their anxiety," and commenting: "I find the surprise appearance of employees at a construction meeting to be thoroughly inappropriate and need to advise you that it should not reoccur"); *id.* at 1130 (5/28/94 e-mail: "Your effectiveness has little to do with where you sit, but a lot to do with how you approach people."); see also *id.* at 1105-07 (6/1/94 letter); *id.* at 1004-05 (6/4/94 e-mail). On the

record before us, it was more than reasonable for UH to conclude that Plaintiff's manner, including the manner in which she expressed herself to others, was having a negative impact both on her performance and on the hospital's operations. *See Umbehr*, 518 U.S. at 676. Because there is no basis for us to second-guess that judgment, we hold that the Pickering balance favors the defendant as to Dr. Craven's IAQ-related speech, and that her speech on that issue was not entitled to First Amendment protection for purposes of her retaliatory discharge claim.

B. Radiation Safety

There is no dispute as to the substance of the plaintiff's telephone conversation with Dr. Hendrick. See IV Aplt. App. 307-09; cf. *Waters*, 511 U.S. at 668. Several of the facts asserted by Dr. Craven in that conversation, however, were controverted by Dr. Johnson. He testified that the incident at issue did not involve a spilt infusion of intravenous radioactive iodine, cf. IV Aplt. App. 307 (testimony of Dr. Craven), but rather, a patient's reaction to radioactive iodine in capsule form. *Id.* at 686 ("What had happened was that the patient had thrown up."). Dr. Johnson also clarified the procedures to be followed when a radiation incident occurred. He explained that the hospital maintained a "call-down list" of several people - including him - that could be called upon to respond in the event of a radiation emergency. *Id.* at 680. Regardless, inadvertently false speech on a matter of public concern may still provide a basis for a retaliatory discharge claim. *See, e.g., Pickering*, 391 U.S. at 572-73.

Even assuming that the call did involve matters of public concern, UH's interests in efficiency far outweigh the

plaintiff's interests, as a citizen, in commenting on the radiation incident at issue to Dr. Hendrick. From the record before us, it appears that Plaintiff's conversation with Dr. Hendrick had a "detrimental impact on close working relationships for which personal loyalty and confidence are necessary, . . . interfered with the regular operation of the enterprise," and "impeded the performance of the speaker's duties . . . ." *Rankin,* 483 U.S. at 388. As noted, it is essential that UH and HSC employees maintain collegial relationships so that they can work with, rather than against, one another in solving problems that affect both institutions. See IV Aplt. App. 736-37. According to Ms. Sens, "major problems developed between UH Administration and the Health Sciences Center because of [Dr. Craven's] communications with Ed Hendrick[] concerning the radiation safety officer." *Id.* at 1114. Ms. Cashman testified that the plaintiff's conversation with Dr. Hendrick would lead to misunderstandings between UH and HSC's radiology department and call Ms. Cashman's credibility as a manager into question. *Id.* at 845-47.

With respect to the plaintiff's own performance, Ms. Sens testified that she had "explicitly advised Dr. Craven to make her concerns known to Joyce Cashman and then let it rest," *id.* at 553, but that Dr. Craven "would just not give it up," *id.*, and that her persistence eventually went "from annoying to destructive." *Id.* at 574. After Dr. Craven's telephone call to Dr. Hendrick, Ms. Sens realized that if Dr. Craven was to continue in her position, she would require "very intense" supervision on a "day to day" basis, obligating Ms. Sens to constantly "check[] what she had said [and] who she had spoken to, a very inappropriate level of supervision" for a manager. *Id.* at 570-71. Simply put, Ms. Sens felt that

she could no longer trust the plaintiff's judgment. *Id.* at 571. We find the foregoing evidence sufficient to tip the Pickering balance in favor of the hospital with respect to the plaintiff's telephone call to Dr. Hendrick.[9] Accordingly, that call

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[9] Due in large part to its misconception of this case as involving an alleged prior restraint, the district court reached a different conclusion as to the balance of interests with respect to the telephone call. IV Aplt. App. 523-24, 878-79. Instead of considering whether and to what extent the hospital's efficiency interests were compromised by speech in which the plaintiff had actually engaged, the court framed the question as whether the hospital's interests were directly furthered by the alleged requirements that Dr. Craven report only to her immediate supervisor or - with respect to radiation safety issues - only to Ms. Cashman. Id. at 510-11, 517, 519, 523-24, 878-79; cf. supra, notes 2-3. It also appears that the court conflated the Pickering balancing inquiry with the separate and distinct analysis required to determine whether a constitutional violation by an individual government employee - if proven - can be attributed to the governmental entity. See, e.g., IV Aplt. App. 508 (statement by the court: "I'm trying to understand what custom or policy was in place by the hospital authority that prevented the plaintiff from speaking out on a matter of public concern . . . ."); id. at 523 (statement by the court, concluding that the alleged reporting requirements did "in fact constitute a custom or policy that . . . [was] designed in a way that doesn't promote the efficiency of the public service being performed by the hospital authority"); cf. *Monell, 436 U.S. at 694* ("It is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.") (emphasis added). As Plaintiff's counsel explained repeatedly, however, Dr. Craven was not attempting to show that she had been "prevented from speaking out," IV Aplt. App. 508, but rather, that she had

provides no basis for Dr. Craven's §1983 claim.

C. Conclusion

In sum, of the four categories of speech cited in Dr. Craven's brief, none can provide an adequate basis for her retaliatory discharge claim. Her argument regarding speech on "other matters" is too vague, her speech concerning infectious waste did not involve a matter of public concern, and even assuming that her IAQ- and radiation safety-related speech touched on matters of public concern, UH's interests, as an employer, clearly outweighed the plaintiff's interests, as a citizen, in commenting on those matters as she did. Accordingly, we hold that UH was entitled to judgment as a matter of law on Dr. Craven's §1983 claim. Because the §1983 claim should never have been submitted to the jury, the other five errors alleged in Dr. Craven's brief were harmless, and we need not address them. See Aplt. Br. at 16-17. We now turn to the plaintiff's pendent claim for wrongful discharge in violation of public policy.

II. Pendent State Claim: Wrongful Discharge in Violation of Public Policy

Dr. Craven's public policy claim never reached the jury. Instead, the district court granted summary judgment for UH on sovereign immunity grounds, I Aplt. App. 154-55, rejecting Plaintiff's argument that § 24-10-106(1)(b) of the Colorado Governmental Immunity Act ("CGIA") waived

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been terminated in retaliation for protected speech. Id. at 509.

UH's immunity as to her claim. Plaintiff renews this argument on appeal.

We review an award of summary judgment de novo, applying the same standard as the district court. *Stamper v. Total Petroleum, Inc. Retirement Plan for Hourly Rated Employees*, 188 F.3d 1233, 1237 (10th Cir. 1999). Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the [appellee is] entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c) (emphasis added). Plaintiff's appeal involves a narrow question of pure law: whether §106(1)(b) waives the State's sovereign immunity with respect to a wrongful discharge action against a public hospital by a former employee whose job duties did not include patient care. Because the Colorado Supreme Court has not yet considered this question, we must predict what that court would do in order to resolve Plaintiff's claim. *See Lytle v. City of Haysville, Kan.*, 138 F.3d 857, 868 (10th Cir. 1998).

Under §106(1)(b) of the CGIA, "sovereign immunity is waived by a public entity in an action for injuries resulting from: . . . (b) The operation of a public hospital, correctional facility, . . . or jail by such public entity . . . ." Colo. Rev. Stat. §24-10-106(1). The statute defines "operation" as "the act or omission of a public entity or public employee in the exercise and performance of the powers, duties, and functions vested in them by law with respect to the purposes of any public hospital, [or] jail . . . ." Colo. Rev. Stat. §24-10-103(3)(a). Neither the CGIA nor any other statute defines "the purpose of [a] public hospital," cf. *Neiberger v. Hawkins*, 70

F. Supp. 2d 1177, 1194 (D. Colo. 1999) (citing statutory purpose of particular hospital), nor has the Colorado Supreme Court articulated a definition of a public hospital's purpose. The Colorado Court of Appeals, however, has held that "the primary purpose of a hospital is to provide medical or surgical care to sick or injured persons." *Sereff v. Waldman,* 2000 Colo. App. LEXIS 2146, No. 99CA1193, 99 CA1497, 2000 WL 1785165, at *4 (Colo. App. 2000) (citing *Plummer v. Little,* 987 P.2d 871, 874 (Colo. App. 1999)). While not binding on this court, "decisions by a state's intermediate appellate courts provide evidence of how the state's highest court would rule on the issue, and we can consider them as such." *Stauth v. Nat'l Union Fire Ins. Co. of Pittsburgh,* 236 F.3d 1260, 1267 (10th Cir. 2001); accord *West v. Am. Tel. & Tel. Co.,* 311 U.S. 223, 237, 85 L. Ed. 139, 61 S. Ct. 179 (1940) ("Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.").

In contrast to the dearth of case law as to the purposes of a public hospital, the Colorado courts have considered the purposes of a jail or correctional facility - also referenced in § 106(1)(b) - on more than one occasion. In both *Flores v. Colo. Dep't of Corrections,* 3 P.3d 464 (Colo. App. 2000), and *Pack v. Arkansas Valley Correctional Facility,* 894 P.2d 34 (Colo. App. 1995), the courts held that "the purpose of a correctional facility is to manage convicts safely and effectively . . . ." *Flores,* 3 P.3d at 466; accord *Pack,* 894 P.2d at 37 ("purpose of the correctional facility [is] to confine inmates safely and effectively"). Although the purpose of a

correctional facility has no bearing on the present case, the courts' decisions in Flores and Pack are instructive on a related, yet more subtle, point. Taken together, those cases stand for the proposition that the alleged injury underlying the action must be "directly related to the purpose, as distinct from the operation," *Pack*, 894 P.2d at 37, of the §106(1)(b) facility before the court will find that the State's sovereign immunity has been waived.

In *Flores*, for example, the court held that the State's sovereign immunity had been waived where the plaintiff alleged that she had slipped and fallen "on a wet floor inside the secure visitor's area of the [correctional] facility." 3 P.3d at 465. "Because the purpose of a correctional facility is to manage convicts safely and effectively, and [because] visitation within the facility directly assists in meeting that purpose, the maintenance of the visitor area within the custodial facility here is directly related to the purpose of the correctional facility." *Id.* at 466 (emphasis added). In Pack, however, the court had held that sovereign immunity was not waived with respect to a claim arising from a slip and fall in the correctional facility's parking lot. 894 P.2d at 37. In so holding, the court of appeals carefully distinguished the operation of the facility from its purpose:

> The maintenance of visitor parking areas in order to facilitate prison visitation is not directly related to the purpose, as distinct from the operation, of a correctional facility. . . .
>
> Although the [Department of Corrections] has established and is maintaining a visitors' parking lot, such function merely is

> ancillary to the purpose of the correctional facility. Therefore, it is not part of the operation of the correctional facility as defined under the CGIA . . . .

Pack, 894 P.2d at 37 (emphasis added). We believe the Colorado Supreme Court would agree with this distinction.

Further, we believe that the Court would agree with the court of appeals' conclusion that "the primary purpose of a hospital is to provide medical or surgical care to sick or injured persons." *Sereff, 2000 Colo. App. LEXIS 2146, *10, 2000 WL 1785165,* at *4; see also *Plummer,* 987 P.2d at 874. Just as a parking lot is "merely . . . ancillary" to the safe and effective confinement of persons convicted of crimes, *Pack,* 894 P.2d at 37, the personnel action at issue here is only remotely related to UH's primary purpose. The relation between a hospital employee's discharge and the provision of "medical or surgical care to sick or injured persons" is particularly tenuous with respect to administrative employees like Dr. Craven. *See, e.g.*, II Aplt. App. 1. Accordingly, we cannot construe §106(b)(1) as a waiver of the State's CGIA immunity with respect to Plaintiff's claim. Although Plaintiff correctly notes that Colorado Supreme Court "broadly construes the CGIA provisions that waive immunity in the interest of compensating victims of governmental negligence," *Springer v. City & County of Denver,* 13 P.3d 794, 798 (Colo. 2000) (citations omitted); accord *Corsentino v. Cordova,* 4 P.3d 1082, 1086 (Colo. 2000); *State v. Nieto,* 993 P.2d 493, 506 (Colo. 2000), the Court has also cautioned that "nonetheless, our primary task in construing a statute is to determine and give effect to the intent of the legislature." *Nieto,* 993 P.2d at 506 (citation omitted). As explained, we do

not believe the Colorado General Assembly intended §106(1)(b) to be applied to claims like the one before us.

Accordingly, the jury's verdict on the plaintiff's §1983 claim is VACATED and that claim is REMANDED to the district court for the entry of judgment as a matter of law in favor of the defendant. The district court's award of summary judgment in favor of the defendant on plaintiff's public policy claim is AFFIRMED.

APPENDIX C

District court's ruling at trial on defense motion for judgment as a matter of law, after the plaintiff had rested (trial transcript, pp. 520-21, 523-24):

THE COURT: Here's my ruling on this. The issue, is, that, of course, RSO Johnson, radiation –

MR. RICE: Radiation safety officer.

THE COURT: Radiation safety officer Johnson really wasn't someone over whom she had direct authority. He was employed by the Health Sciences Center and was on contract to University Hospital. And there's enough evidence on the record to show that there were safety concerns about whether or not he had a beeper, or a pager and was reachable. So that's sort of a backdrop.

And when you have a specific incident where there was a radiation spill and because of the plaintiff's concern about that radiation spill and how it was handled and her belief on a concomitant basis that the handling of that jeopardized safety and was a matter of public concern, I'm going to make a legal finding that the employee's speech for which she was fired can be fairly characterized as constituting speech in a matter of public concern for the reasons I've just stated.

So let's go to the second issue.

* * *

Here's what I'm going to do. I'm not going to foreclose another Rule 50 motion after all the evidence is in. But based on the motion you made now rather than at the close of all the evidence, the Court believes that viewing the evidence in the light most favorable to the nonmoving party, the plaintiff, there is sufficient evidence on the record that the directive from Ann Jones, coupled with the directive from Miss Cashman that the plaintiff communicate her safety concerns in all instances to Miss Jones as to all issues and then to Miss Cashman as to the issues concerning things that may relate to RSO Johnson and environmentally things that involve radiation spills, does in fact constitute a custom or policy that again, for purposes of this case, is designed in a way that doesn't promote the efficiency of the public service being performed by the hospital authority.

So I'm going to find that - and I'll make a ruling under the **Pickering** analysis that the second prong of the test has been established such that, in this case, the employee's interests, Dr. Craven's interests as a citizen in commenting upon matters of public concern outweighs the interests of the state as an employer in performing the public service it performs through its employees based on this custom the Court has articulated. Which means, then, that the jury will have to decide questions three and four.

And what I would urge counsel to do, if he wishes to, is revisit this, the Court's ruling, or ask me to revisit it after the [*sic*] all the evidence is in, because I don't have enough evidence to put it in context. I'm not going to rule against the plaintiff at this stage of the case, because I don't have all the evidence.

District Court Ruling

District court's ruling at trial on defense motion for judgment as a matter of law, after both parties had rested (trial transcript, pp.878-79):

THE COURT: I'm going to deny the motions. First incorporate by reference all my prior statements. So I deny the motion for Rule 50 judgment as to the breach of implied contract for all the reasons previously stated.

Also incorporate by reference everything I said regarding the **Pickering** balancing test, and I add these factors. I believe there is sufficient evidence for the jury to decide the fact questions. I will reaffirm my legal ruling that with respect to the first two prongs of the **Pickering** test that the Court make legal findings that free speech issues were implicated in a way that gives rise to a valid claim.

And even though there's been evidence that there was justification from the employer's standpoint to preclude Dr. Craven from reporting directly outside of her chain of command, we still have the testimony of the plaintiff which has been unrebutted that there was a radiation spill immediately preceding her communication to Dr. Hendrick, and the jury will have to decide if in fact that occurred or didn't occur.

But taking the plaintiff's testimony as truthful just for purposes of this motion, I still believe that the hierarchy that was in place and the directives given by Miss Cashman, as chief operating officer, which required the plaintiff to go through her before she could comment on any RSO safety issues did in fact constitute a policy that had the potential for restraining free speech. So I believe the first two prongs of

the **Pickering** test are met for legal reasons, and I'll let the jury decide questions three and four.

District court's ruling at trial on scope of speech covered in paragraph 1 of instruction 22 (trial transcript, p. 805):

MR. ROSEMAN: And, Your Honor, I know you said not to go back to 22, but we also ask you to look at the [*sic*] paragraph 1, in our proposed, tender [*sic*] 2 because we submit that the first paragraph - that subparagraph 2 is too narrow in terms of my client's free speech claim.

THE COURT: You mean you want it to be broader.

MR. ROSEMAN: We want the language that I think is [*sic*] the version that's in front of the Court. I'm not sure what the exact language is.

THE COURT: This is the proposed instruction no. 2. I'm going to reject that. What I'm going to do is I'm going to give it the way it is because that's what she reported. I went back and looked carefully at her testimony. So she's going to either win or lose based on her version of what happened, and that's the way it should be in trial.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Civil Action No. 99-1519

PATRICIA CRAVEN,
Plaintiff-Appellant,

v.

UNIVERSITY OF COLORADO HOSPITAL AUTHORITY,
Defendant-Appellee.

PLAINTIFF-APPELLANT'S OPENING BRIEF

COMES NOW the Plaintiff-Appellant, by and through her attorneys, Roseman & Kazmierksi, LLC, and respectfully submits the following Opening Brief herein:

QUESTIONS PRESENTED FOR REVIEW

The following questions are presented for review in this case:

1. Whether the district court erred in refusing to instruct the jury on Dr. Craven's theory that University Hospital was liable for a single decision, allegedly made in

retaliation for the exercise of her First Amendment rights, if a person with final policymaking authority approved that decision and the basis for it; and

2. Whether the district court erred in concluding that University Hospital was not liable on Dr. Craven's claim of termination of employment in violation of public policy, on the ground that the termination of her employment did not result from the operation of a public hospital.

STATEMENT OF THE CASE

Summary of the Facts. Patricia A. Craven, Dr. P.H. (Aplt. App. 298), worked for the University of Colorado Hospital Authority (hereinafter, "University Hospital") in 1994 as the hospital's Manager of Safety and Risk Management. Her Position Description (Aplt. Supp. App. 1-2) provided, *inter alia,* that she served as the hospital's Safety Officer and as its Risk Manager. The former set of responsibilities included assessing, developing, implementing and monitoring the effectiveness of the hospital-wide Safety Management Program; monitoring the effectiveness of hospital-wide and departmental safety policies and procedures; and monitoring compliance with applicable codes, standards and regulations (Aplt. Supp. App. 1).

Dr. Craven began working at University Hospital on March 21, 1994 (Aplt. App. 181). Her immediate predecessor, Beverly Rahorst, showed her a thick file labeled "Frustrations, Stumbling Blocks, and Problems" that contained documents about indoor air quality, asbestos removal, leakage of bio-hazardous substances, and other health and safety issues (Aplt. App. 185-187). Ms. Rahorst

described indoor air quality problems, dating back to October 1993, resulting from construction activity at the adjacent Barbara Davis Center (Aplt. App. 183-184), since an air intake for the hospital was located a short distance from that construction site. At a meeting on April 12, 1994 (*see* Aplt. App. 303-304), Dr. Craven reported that the Barbara Davis Center fumes were causing employees and patients in the hospital's west wing to become ill, that those employees said they were "putting up with it," but did not know how much longer they would take it (Aplt. App. 188).

The Barbara Davis Center is affiliated with the University of Colorado Health Sciences Center (hereinafter, "Health Sciences Center"). The project manager for the renovation work on that facility in 1993 and 1994 was John Allison, a Health Sciences Center employee (Aplt. App. 243, 244). Dr. Craven met with Mr. Allison, other employees of the Health Sciences Center, and representatives of the general contractor for the project on April 29 and May 2, 1994, in connection with these indoor quality problems (Aplt. App. 305). She provided a written report (*Id.*) to University Hospital employees on May 2, 1994, in which she described the efforts that were being taken to deal with those problems. Between May 2 and 5, 1994, 72 University employees completed a survey form (Aplt. App. 306-14), in which they reported a series of symptoms, including fatigue, headaches, burning eyes and nausea, which they attributed to the Barbara Davis Center construction work. Dr. Craven spoke with approximately half of those persons, who related their health problems to her quite emotionally (Aplt. App. 189). Dr. Craven informed her immediate supervisor, Ann Jones, that the problem was bigger than imagined (Aplt. App. 190).

Dr. Craven attended a meeting with Health Sciences Center and contractor representatives on May 10, 1994 (Aplt. App. 191). Although she emphasized the urgency of resolving this long-standing problem, she testified that the construction representatives at the meeting did not want to admit there was a problem (Aplt. App. 192-94). Between May 10 and 19, 1994, Dr. Craven sent Mr. Allison and other construction representatives a series of e-mail messages (Aplt. App. 315-23), in an attempt to learn the status of the contractor's mitigation efforts and to urge that that work be expedited. On May 18, 1994, Dr. Jones gave Dr. Craven authority to shut down the Barbara Davis Center project any time she felt it was appropriate (Aplt. App. 323).

Dr. Craven continued to receive complaints of emission-related symptoms from employees, and began receiving complaints from patients, after she received authority to shut down this project (Aplt. App. 195). She testified that Mr. Allison had no problem with her inviting University Hospital employees to a meeting on May 19, 1994 (Aplt. App. 196).[1] Some employees were planning to picket the hospital building and to contact the media if something was not done about the indoor air quality problem (Aplt. App. 228).[2] Dr. Craven hoped that providing these employees with

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[1] Mr. Allison claimed that he had no prior knowledge that she would be inviting hospital employees to that meeting (Aplt. App. 245).

[2] James Robert Kohler, a project manager for the general contractor (Aplt. App. 249), testified that he had heard talk of employees' picketing the hospital and calling investigative reporters at television stations in connection with this problem (Aplt. App. 251).

a forum to discuss their concerns and an opportunity to hear about the mitigation efforts directly from the persons responsible for implementing them would help to defuse this situation (*Id.*)

That meeting became emotional.[3] Although Mr. Allison wrote his immediate supervisor an e-mail message about Dr. Craven's alleged conduct during that meeting (Aplt. App. 350-52), Dr. Jones sent Dr. Craven an e-mail message (Aplt. App. 324) the following Monday, May 23, 1994, in which she stated that she thought that Dr. Craven was "doing a nice job, and it is nice to have you here."

Dr. Jones sent Dr. Craven a memorandum (Aplt. App. 348-49) on May 24, 1994, the purpose of which was to make suggestions that she felt would make Dr. Craven more effective in her work (Aplt. App. 264).[4] On June 2, 1994,

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[3] University Hospital's witnesses contradicted each other about the hospital employees' demeanor and conduct during that meeting. Mr. Allison, who claimed to have no problem with the attendance of those employees at that meeting (Aplt. App. 246), testified that they were civil and that they understood that progress was being made (Aplt. App. 247). Mr. Kohler testified that the meeting turned into havoc after two minutes, with the employees wanting to shut the construction site down and not wanting to discuss the efforts to mitigate the indoor air quality problem (Aplt. App. 250).

[4] Dr. Jones also testified that she had written that memorandum because Dr. Craven had suggested in the May 19 meeting that the Health Sciences Center stop construction, allegedly without involving Dr. Jones in advance (Aplt. App. 259-60). Dr. Jones admitted under cross-examination that she had given Dr. Craven the authority to shut down that project the day before that meeting (Aplt. App. 263).

Dr. Jones' secretary signed a memorandum, entitled a "Written Warning" letter (Aplt. App. 345-47), concerning Dr. Craven's decision to send her May 2 memorandum (Aplt. App. 305) to senior management without notifying Dr. Jones in advance and concerning an alleged discussion outside Dr. Jones' office (Aplt. App. 266-67).[5] Dr. Jones testified that a letter that serious is not one that she would have had her secretary sign and that she did not recall giving her secretary the authority to sign that letter on her behalf (Aplt. App. 265). Dr. Jones did not recall contributing some of the language contained in that document (*Id.*).

This June 2 memorandum stated that one of the corrective actions Dr. Jones should take was to "[d]irect all comments about the safety of the Hospital to me as your immediate supervisor" (Aplt. App. 346). Dr. Jones admitted under cross-examination that she was not saying that Dr. Craven could not discuss safety issues with members of the safety committee or the disaster committee, with her own employees, with employees of the hospital's Engineering Services Department, with employees at the Health Sciences Center who were involved in those safety issues, or with employees of regulatory agencies (Aplt. App. 267-68). Dr. Jones testified that all that she meant by that statement was that she wanted to be sure she was informed about the comments Dr. Craven made to other people about safety issues (Aplt. App. 268).

Dr. Craven recalled that, in a meeting held on June 25, 1994, Donna Koeppel, a representative of the hospital's

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[5] Dr. Craven denied having made the statement outside Dr. Jones' office alleged in that memorandum (Aplt. App. 198).

Human Resources Department, stated that she and other management employees were in agreement that it would not be realistic for Dr. Craven to direct her safety-related comments only to her immediate supervisor (Aplt. App. 201). Dr. Craven testified that both Dr. Jones and her new supervisor, Ruth Sens, agreed with that statement (Aplt. App. 202).

In June 1994, Dr. Jones ceased being Dr. Craven's supervisor. Both Dr. Craven (Aplt. App. 199-200) and Dr. Jones (Aplt. App. 261-62) testified that this change occurred because of the inherent conflict of interest between Dr. Jones' supervision of Dr. Craven as the hospital's Safety Officer and Dr. Jones' role in supervising the construction activities for which Dr. Craven had safety responsibilities. Ms. Sens was the Director of Quality Management at University Hospital (Aplt. App. 234-35), and reported to Joyce Cashman.

This indoor air quality matter was far from the only safety-related issue in which Dr. Craven was involved, either before or after her department was transferred to Ms. Sens' supervision. University Hospital had extensive problems with asbestos exposure, due to renovation work in areas of the hospital in which asbestos was hanging out of the walls exposed and was airborne (Aplt. App. 203-04). In early April 1994, she began efforts to have speed bumps installed in the parking structure for the hospital. She took that action because the hospital exit and patient pick-up area was located next to the bottom of a spiral-shaped exit ramp, exposing wheelchair-bound patients to the risk of injury from speeding motorists (Aplt. App. 213-14). On April 5, 1994, Dr. Craven sent Mr. Allison a memorandum, with Dr. Jones' approval, concerning toddler-high, non-childproof electrical outlets in

a walkway between the parking structure and the hospital building (Aplt. App. 215). Dr. Craven had to send a follow-up e-mail message to Mr. Allison on May 10, 1994, asking him about the status of the speed bumps and the childproof outlets that she had addressed in her April 5 memorandum to him (Aplt. App. 248). The speed bumps, but not the childproof outlets, had been installed by August 9, 1994 (Aplt. App. 325).

Dr. Craven also had to deal with serious problems concerning the storage of bio-hazardous waste. Although University Hospital had a well designed, refrigerated and locked storage room, the door to that room frequently was left unlocked (Aplt. App. 205). Hypodermic needles and other "sharps" also were stored in the bags left in that room (*Id.*). Dr. Craven's assistants took photographs of the leaking, decayed bags that were stored in that room and on the loading dock (*Id.*).

After bringing this issue to the attention of the hospital's safety committee and other employees involved with the issue of infection control and after arriving at some proposed solutions (Aplt. App. 206), Dr. Craven decided to bring this issue to the attention of University Hospital's management council (Aplt. App. 207). She wanted to show the photographs to this group, which consisted of peers of hers who supervised hospital units that generated this bio-hazardous waste, in order to illustrate the seriousness of this problem (Aplt. App. 207-08). Dr. Craven testified that Ms. Sens responded to that proposal by telling her that "you're treading on thin ice there" and by telling her that Ms. Cashman did not like photographs -- especially of bio-hazardous waste -- to be presented at meetings (Aplt. App.

208-09). Dr. Craven also testified that Ms. Sens warned Dr. Craven that it could be real dangerous for her to do this (Aplt. App. 209). Dr. Craven proposed having the photographs displayed on a poster board outside the management council's meeting room (*Id.*). Ms. Sens removed the photographs that she felt to be "really gross," in Dr. Craven's words, told her not to put captions or locations on them, and to stand in the hall in case someone had questions for her (*Id.*).[6]

This was not the first time that one of Dr. Craven's supervisors had told her not to discuss safety issues with others. In addition to the June 2 memorandum (Aplt. App. 345-47), Dr. Jones had told Dr. Craven that she should not have brought other hospital employees to the meeting on May 19, 1994 (Aplt. App. 197). Dr. Jones also had forbidden Dr. Craven from meeting with her counterpart at the Department of Veterans Affairs Medical Center, a hospital located immediately next to University Hospital (Aplt. App. 210-11), because those employees were federal employees (Aplt. App. 212-13).

In September and October 1994, an issue arose concerning Dr. Timothy Johnson, the designated Radiation Safety Officer (hereinafter "RSO") for University Hospital (Aplt. App. 217, 330). Under a cost allocation contract with the Health Sciences Center, Dr. Johnson was responsible for emergency responses in the hospital, radiation safety drills,

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[6] Ms. Sens confirmed that Dr. Craven had asked her about presenting this photographic evidence to the management counsel, and that she had discouraged Dr. Craven from doing so. (Aplt. App. 236-37).

and other matters (Aplt. App. 216). Under a different contract, Dr. Harry Cullings was responsible for matters such as file badges and certain investigations (*Id.*). In September 1994, Dr. Craven informed Ms. Cashman that Dr. Johnson was not wearing a pager and was not available in the event of spills of radioactive materials or other similar accidents (Aplt. App. 218). [7]

At 11:09 a.m. on October 27, 1994, Ms. Cashman sent a e-mail message to Dr. Craven (Aplt. App. 333), in which she discussed the recruitment for a new RSO and stated that "[i]f you find areas not being addressed please send me details of the issues and I will address them." Dr. Craven responded in an e-mail message at 12:14 p.m. that same day (*Id.*), in which he stated that the Emergency Room, the Health Sciences Center, and she had "many issues that are not being addressed" and that Dr. Johnson "is simply not doing the job." Ms. Cashman responded in an e-mail message at 12:35 p.m. that same day (*Id.*), in which she stated:

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[7] This was not a new issue. When Dr. Craven began her employment at University Hospital, Ms. Rahorst showed her minutes of meetings in which Dr. Johnson was sanctioned by the head of the disaster committee for being unavailable and not wearing a pager (Aplt. App. 182). Dr. Johnson admitted that he did not wear a pager (Aplt. App. 254) and that the only way to reach him outside of his normal working hours was through a call to the University Hospital police department, which had his home telephone number (Aplt. App. 257). He also admitted that he wanted to discontinue serving as the hospital's RSO because of his receipt of a five-year research grant and other increased duties in his faculty position at the Health Sciences Center (Aplt. App. 252-53).

> Pat, The kRSO [*sic*] position is a radiology position hired by the school of medicine, as I told you. It remains a separate position form [*sic*] the general hospital safety function. You may need to be a member of the radiation safety committee. Please address your issue to me and I will review with Tim Johnson. I assume by your info that you have raised all the issues with him to date. I'll look forward to reading your summary of the issues yuou [*sic*] refer to.

Ms. Cashman testified at trial that she did not tell Dr. Craven, in these e-mail messages or otherwise, not to talk or speak with anyone else about her concerns, and did not forbid her from talking to Dr. Ed. Hendrick of the Health Sciences Center (Aplt. App. 294-95). In her deposition, Ms. Sens testified that she did not tell Dr. Craven not to speak with anyone other than Ms. Cashman about the RSO issue (Aplt. App. 240-41). Dr. Craven understood Ms. Cashman's comment, in her second e-mail message on October 27 to "address your issue to me and I will review with Tim Johnson," to mean that she should include these issues in the report she was preparing for Ms. Cashman (Aplt. App. 219). Dr. Craven decided to contact Dr. Johnson, since she had not raised all of her issues with him by that date (*Id.*).

At 4:33 p.m. on that same date, Dr. Johnson sent an e-mail message to Dr. Craven, in response to an earlier message she had sent to him about the status of the RSO position at University Hospital (Aplt. App. 333-34). Dr. Johnson suggested in that message that she contact either Dr. Ed Hendrick, the Health Sciences Center's Division Chief of

Radiological Services, or Dr. Michael Manco-Johnson, the Department Chair, since they were responsible for hiring the new RSO (Aplt. App. 334). He stated: "Maybe if you talked to them you could prod things along a little faster. Somebody needs to light a fire under them!" (*Id.*).

Dr. Craven left a telephone message with Dr. Hendrick, to which he responded (Aplt. App. 220). She discussed a spill of radioactive iodine involving a patient on 8 North of University Hospital, which she described as being the cancer ward (Aplt. App. 221). She understood that the nurses were terrified to go into the room because they were not skilled in radioactive cleanup (*Id.*). Because they could not reach Dr. Johnson, they evidentially called Dr. Cullings, who had done the cleanup even though that was not part of his responsibilities (Aplt. App. 222). He stated that he did not want to be called out in the middle of the night for a job that was not his responsibility to perform (*Id.*).[8] Dr. Craven and Dr. Hendrick discussed emergency responses to these kinds of situations and a résumé for the RSO position that she had received by mistake (Aplt. App. 222-23).

Dr. Craven described her tone of voice during that telephone conversation as being "conversational" (Aplt. App. 224). Dr. Hendrick did not recall Dr. Craven as being angry, upset or saying anything in a loud or confrontational tone of

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[8] Ms. Cashman testified that no radiation therapy was done on 8 North, since that was a gastrointestinal ward (Aplt. App. 272). Dr. Johnson testified that the incident had occurred on 8 West (Aplt. App. 255). He claimed that this was not a radiation emergency (Aplt. App. 256) and blamed the nurses on that ward for not "choos[ing] to learn" what he had attempted to teach them (Aplt. App. 257-58).

voice (Aplt. App. 229). He recalled there being nothing unusual about that conversation (*Id.*). He did not recall being upset or angry as a result of that conversation (*Id.*).

On November 3, 1994 (Aplt. App. 227), Ms. Sens taped a memorandum to the door to Dr. Craven's office on a day that Dr. Craven was not at work due to a doctor's appointment (Aplt. App. 225). In that memorandum (Aplt. App. 353), she requested copies of all notes, e-mail messages, and the context of all telephone messages that Dr. Craven had had with Dr. Hendrick concerning the role of the RSO. Dr. Craven responded the same day with a typewritten memorandum (Aplt. App. 354) that summarized her conversation with Dr. Hendrick. The next day, Ms. Sens prepared a draft memorandum for a five-day suspension of Dr. Craven (Aplt. App. 335-37). The only incident that she discussed in that document in terms of needed improvement by Dr. Craven involved her telephone conversation with Dr. Hendrick (Aplt. App. 335).

On November 8, 1994, Ms. Sens wrote a letter (Aplt. App. 344) to Dr. Craven terminating her employment "due to a lack of professional behavior and insubordination." The only event listed in that letter that had occurred under Ms. Sens' supervision of Dr. Craven was that she had contacted Dr. Hendrick "and proceeded to have an extremely inappropriate phone discussion with him" (*Id.*). Ms. Sens claimed that this "was in direct conflict with the information" Dr. Craven had received from Ms. Cashman, "telling you to address issues regarding the radiation safety officer directly to her" (*Id.*).

Dr. Craven submitted a written appeal (Aplt. App.

359-61) from that decision. On November 30, 1994, Ms. Cashman -- University Hospital's Vice President of Operations -- sent Dr. Craven a letter (Aplt. App. 355-58), denying that appeal. Ms. Cashman informed Dr. Craven that her decision was based, in whole or in part, on the fact that she believed that Dr. Craven had acted inappropriately in speaking with Dr. Hendrick (Aplt. App. 355-56). Dennis Brimhall, the President of University Hospital, upheld Dr. Craven's termination after a "complete review" of her grievance material and after intensive interviews with the individuals directly involved with the termination decision (Aplt. App. 343).

Summary of the Proceedings. Dr. Craven filed a Complaint (Aplt. App. 1-6) against University Hospital.[9] The claims asserted in that Complaint included termination of employment in violation of public policy and in violation of her First amendment rights.[10] On December 2, 1997, University Hospital moved for summary judgment on all of Dr. Craven's claims for relief.[11] Judge Daniel ruled from the

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[9] Dr. Craven filed that Complaint in state court. University Hospital removed the case to federal district court (Aplt. App. 407).

[10] Dr. Craven also included claims for breach of implied contract and promissory estoppel in that Complaint. The jury reached a verdict for University Hospital on the implied contract claim and the district court found in favor of University Hospital on the promissory estoppel claim. Dr. Craven is not appealing those decisions in this case.

[11] Appellant's Appendix contains the briefs filed by the parties in connection with that Motion for Summary Judgment, and those

bench on those claims at a hearing held on January 13, 1999.

The district court dismissed Dr. Craven's public policy claim on the ground that University Hospital, a political subdivision of the State of Colorado, §23-21-503(1), C.R.S., was immune from liability pursuant to the Colorado Governmental Immunity Act ("CGIA").[12] The district court concluded that Dr. Craven's public policy claim did not "flow[] from the operation of a public hospital," and that instead what "it flows from is that she had a dispute and disagreement with her supervisors which led to her termination" (Aplt. App. 155). It elaborated on that conclusion by stating that the claim she was asserting "really does not go to the true purpose for which the public hospital was operational" (Aplt. App. 158).

University Hospital moved for judgment as a matter of law at the close of Dr. Craven's case in chief at trial. The district court ruled that the speech for which Dr. Craven's employment was terminated could be fairly characterized as constituting speech on a matter of public concern (Aplt. App. 230-31). The district court also found that Dr. Craven's interests as a citizen in commenting upon matters of public concern outweighed the interests of University Hospital as an employer in performing the public services it performs

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exhibits or attachments to the briefs that concerned Dr. Craven's public policy claim.

[12] As discussed in more detail *infra* at 18-20, the CGIA provides that sovereign immunity is waived in an action for injuries resulting from a public entity's "operation" of a public hospital. §24-10-106(1)(b), C.R.S.

through its employees (232-33).[13] The district court reached the same conclusion with respect to the second of these two issues in its ruling on University Hospital's motion for judgment as a matter of law at the close of all the evidence at trial (Aplt. App. 296-97).

Dr. Craven objected (Aplt. App. 273-80, 285-88) to Instruction No. 22, which had been drafted by the district court. That instruction set forth the elements for Dr. Craven's First Amendment retaliation claim. Dr. Craven will discuss that instruction and her objections in more detail *infra* at 12-17. The district court overruled those objections and decided to give that instruction (Aplt. App. 291-93).

The jury entered a verdict in favor of University Hospital on Dr. Craven's First Amendment retaliation claim (Aplt. App. 366). Dr. Craven filed a post-trial motion (Aplt. App. 368-79), in which she argued, *inter alia*, that the district court had erred in giving Instruction No. 22. The district court denied that motion on October 15, 1999 (Aplt. App. 397-403).

Dr. Craven filed a timely notice of appeal to this Court on November 12, 1999 (Aplt. App. 404-05).

STANDARD OF REVIEW

When a party objects to instructions at trial, this Court conducts "a *de novo* review to determine whether, as a whole,

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[13] Since University Hospital has not cross-appealed from those decisions, Dr. Craven will not discuss them any further in this brief.

the instructions correctly stated the governing law and provided the jury with an ample understanding of the issues and applicable standards." *Advantor Capital Corp. v. Yeary*, 136 F.3d 1259, 1265 (10th Cir. 1998). This Court's reviews the trial court's conclusions on legal issues in connection with jury instructions *de novo,* and needs not defer to its decisions on questions of law." *Roberts v. Progressive Independence Inc.*, 183 F.3d 1215, 1222 (10th Cir. 1999). Assuming that an instruction properly sets forth the relevant law, this Court reviews the district court's decision to give the particular instruction for an abuse of discretion. *Kinser v. Gehl Co.*, 184 F.3d 1259, 1273 (10th Cir. 1999), *cert. denied,* 120 S.Ct. 985 (2000).

This Court grants *de novo* review of an order granting summary judgment. *Universal Money Centers, Inc. v. A.T.& T.*, 22 F.3d 1527, 1529 (10th Cir. 1994), *cert. denied*, 513 U.S. 1052 (1994). Summary judgment is appropriate only if the record contains no evidence of a genuine issue of material fact and demonstrates that the moving party is entitled to judgment as a matter of law. *See Woodman v. Runyon*, 132 F.3d 1330, 1337 (10th Cir. 1997). This Court requires that the nonmovant be given "wide berth to prove a factual controversy exists." *Ulissey v. Shvartsman*, 61 F.3d 805, 808 (10th Cir. 1995). Neither this Court nor the district court can weigh the evidence, but instead must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Bingaman v. Kansas City Power & Light Co.*, 1 F.3d 976, 980 (10th Cir. 1993) (internal quotation marks and citation omitted). In making this determination, this Court and the district court must view the record and all reasonable inferences drawn therefrom in

the light most favorable to the nonmoving party. *See Thomas v. Internat'l Business Machines*, 48 F.3d 478, 484 (10th Cir. 1995).

ARGUMENT

I. THE DISTRICT COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON DR. CRAVEN'S THEORY THAT UNIVERSITY HOSPITAL WAS LIABLE FOR A SINGLE DECISION, ALLEGEDLY MADE IN RETALIATION FOR THE EXERCISE OF HER FIRST AMENDMENT RIGHTS, IF A PERSON WITH FINAL POLICYMAKING AUTHORITY APPROVED THAT DECISION AND THE BASIS FOR IT.

Instruction No. 22 set forth the elements of Dr. Craven's claim that University Hospital had terminated her employment in violation of her First Amendment rights. That instruction (Aplt. App. 362-63) read as follows:

> In order for the Plaintiff, Patricia Craven, to recover from the Defendant, University of Colorado Hospital Authority, on her claim of violation of the Plaintiff's constitutional right to freedom of speech, you must find all of the following have been proved:
>
> (1) The Plaintiff reported to Dr. Hendrick substantial concerns she had regarding a radiation spill at 8 North of

University Hospital, how that spill was handled, its adverse impact on patient care and overall hospital safety, and the unavailability of the Radiation Safety Officer to attend to such emergencies;

(2) The Defendant terminated the Plaintiff following this contact with Dr. Hendrick:

(3) The Plaintiff's expression of her views to Dr. Hendrick on the issues specified in paragraph (1) above was a substantial or motivating factor in the Defendant's decision to terminate the Plaintiff;

(4) The Defendant had an official policy or custom, which required the Plaintiff to report all health and safety concerns associated with her job duties only to a supervisor, and such policy or custom deprived the Plaintiff of her constitutional right of freedom of speech.

If you find that any one or more of these four propositions has not been proved by a preponderance of the evidence, then your verdict must be for the Defendant.

On the other hand, if you find that all of these four propositions have been proved by a

> preponderance of the evidence then your verdict must be for the Plaintiff unless you also find that the Defendant's affirmative defense of termination for other constitutionally permissible reasons or motives has been proved by a preponderance of the evidence, in which event, your verdict must be for the Defendant.

Dr. Craven argued at trial that subparagraph (4) of this instruction was erroneous (Aplt. App. 273-74, 276-77, 279-80, 283-90).[14] That subparagraph required Dr. Craven to prove by a preponderance of the evidence that University Hospital "had an official policy or custom which required [her] to report all health and safety concerns associated with her job duties only to a supervisor ...."(Aplt. App. 362). To subject a governmental entity such as University Hospital to liability, "a municipal policy must be a 'policy statement, ordinance, regulation, or decision officially adopted and promagated by [its] officers.'" *Murrell v. School Dist. No. 1,* 186 F.3d 1238, 1249 (10th Cir. 1999); *Lankford v. City of Hobart,* 73 F.3d 283, 286 (10th Cir. 1986). In the absence of such an official policy, a public entity such as University Hospital can be held liable if the practice in question is "so permanent and well settled as to constitute a 'custom or usage' with the force of law." *Murrell,* 186 F.3d at 1249; *Lankford,* 73 F.3d at 286. These same principles apply in First

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[14] Instruction No. 22, as given to the jury, consolidated into subparagraph (4) the language that had been contained in subparagraphs (4) and (5) of the draft of that instruction that the district court and the parties' attorneys discussed on the record at the end of the prior day's testimony (Aplt. App. 282-83).

Amendment retaliation cases. *See, e.g., Schalk v. Gallemore*, 906 F.2d 491, 498 (10th Cir. 1990).

Dr. Craven presented no evidence, and did not contend at trial, that University Hospital had adopted a formal policy or had a custom of requiring any person in her position or any person in a similar position to report all health and safety concerns associated with that person's job duties only to a supervisor. The district court was of the opinion that Dr. Jones' memorandum of June 2, 1994, Ms. Cashman's e-mail messages, and Ms. Sens' alleged communications with Dr. Craven established that "there was a policy in place" to that effect (Aplt. App. 287-88). However, Dr. Craven got Dr. Jones to admit, under cross-examination, that she was not saying that Dr. Craven could not say anything about safety in meetings of the safety or disaster committees, in discussions with any of the employees she supervised, with employees at the hospital's Engineering Services Department, or with employees at the Health Sciences Center who were involved in the safety issues about she was concerned (Aplt. App. 267-68). Dr. Jones also admitted under cross-examination (Aplt. App. 268) that the statement in her June 2 memorandum that Dr. Craven should "[d]irect all comments about the safety the Hospital to me as your immediate supervisor" meant that Dr. Craven *could* direct comments about safety to other people as long as Dr. Jones was informed about those comments. Similarly, Dr. Craven got Ms. Cashman to admit under cross-examination that she had not told Dr. Craven "not to contact or speak to anyone else about her concerns" (Aplt. App. 295). Ms. Sens admitted under cross-examination that she did not recall telling Dr. Craven not to contact anyone other than Ms. Cashman about her safety-related concerns (Aplt. App. 239).

In addition, Ms. Cashman testified that each department at University Hospital had a policy and procedure manual, in addition to the specific written policies dealing with human resources issues (Aplt. App. 269-70). The jury easily could have believed from all this testimony that University Hospital had no official policy requiring Dr. Craven to report all health and safety concerns associated with her job duties only to a supervisor. Dr. Craven presented no evidence that any of the thousands of policies contained in the hospital's policy and procedure manuals contained any such requirement. Dr. Jones, Ms. Cashman and Ms. Sens all testified that they had not required Dr. Craven to report all such concerns only to a supervisor. Instruction No. 22 effectively required the jury to return a verdict for University Hospital on Dr. Craven's §1983 claim.

Dr. Craven asked the district court instead to give her Tendered Instruction No. 2 (Aplt. App. 364). Subparagraph (1) through (3) of that tendered instruction would have required Dr. Craven to prove that she had expressed her views concerning the RSO position to Dr. Hendrick, that University Hospital had terminated her employment after she had expressed those views, and that her expression of those views was a substantial or motivating factor in that decision. Subparagraph (4) would have required her, in addition, to prove that a "person with final decision-making authority for University Hospital with respect to her employment either decided to terminate her employment or approved a subordinate's decision and the basis for it" (*Id.*).

Dr. Craven's Tendered Instruction No. 2 correctly stated the law. An entity such as University Hospital can be held liable for a single decision made by a person with final

policymaking authority for that governmental entity with respect to a particular action upon which the lawsuit is based. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-81 (1986). A governmental entity also can be held liable for monetary damages when the persons with final policymaking authority "approve a subordinate's decision and the basis for it." *City of St. Louis v. Praprotnick*, 485 U.S. 112, 127 (1998). *See also Turner v. Upton County, Tex.*, 915 F.2d 133, 136 (5th Cir. 1990) (one method of establishing liability is if the public entity's final policymakers have "condoned creation of a custom by ratifying the unconstitutional or illegal actions of subordinate officers or employees"); *Feliciano v. City of Cleveland*, 988 F.2d 649, 655 (6th Cir. 1993) (City can be liable if the Chief of Police had the final authority to make final policy regarding drug testing of police or if a final policymaker for the City ratified his actions); *Cornfield by Lewis v. Consolidated High School Dist. No. 230*, 991 F.2d 1316, 1330 (7th Cir. 1993).

The evidence presented at trial supported that instruction, and in particular subparagraph (4) of it. Ms. Cashman testified in her deposition, in an excerpt that was read the jury, that Ms. Sens needed her approval in order to terminate Dr. Craven's employment (Aplt. App. 294). Ms. Sens asked Ms. Cashman, in a draft of the memorandum she prepared before the one that terminated Dr. Craven's employment (Aplt. App. 335-37), for Ms. Cashman's input on what language to include in that document (Aplt. App. 242). Both Ms. Cashman (Aplt. App. 355-58) and Mr. Brimhall (Aplt. App. 343), University Hospital's President, approved Ms. Sens' decision to terminate Dr. Craven's employment. Ms. Cashman stated explicitly that she had approved Ms. Sens' decision to terminate Dr. Craven's employment because

of Dr. Craven's telephone call with Dr. Hendrick (Aplt. App. 355-56). Mr. Brimhall stated that he had made his decision after a complete review of Dr. Craven's grievance material and intensive interviews with the individuals directly involved with the termination decision (Aplt. App. 343). University Hospital's appeal procedure (Aplt. App. 341) provided that the decision of the President of University Hospital on an employee appeal "is final." *Starrett v. Wadley*, 876 F.2d 808, 818 (10th Cir. 1989) (county assessor had final authority to set employment policy as to the hiring and firing of his staff); *Hall v. Marion School Dist. No. 2*, 31 F.3d 183, 196 (4th Cir. 1994) (school board ratified superintendent's retaliatory actions against teacher in violation of the First Amendment); *Pearson v. Macon-Bibb County Hosp. Authority*, 952 F.2d 1274, 1281-82 (11th Cir. 1992) (publicly funded hospital could be held liable for allegedly unconstitutional termination of employment if its administrator ratified the termination decision).

In *Harrison v. Eddy Potash, Inc.*, 158 F.3d 1371, 1377 (10th Cir. 1998), *aff'g* 112 F.3d 1437, 1450-51 (10th Cir. 1997), *cert. granted, vacated and remanded*, 118 S. Ct. 2364 (1998), this Court held that the district court had erred by refusing to instruct the jury on the plaintiff's theory of misuse of supervisory authority. This Court concluded that the evidence at trial clearly indicated that an individual defendant had had actual immediate supervisory authority over the plaintiff and had misused that authority to harass her. "Thus, Harrison was entitled to have the jury instructed on her 'abuse of actual authority' theory of liability against Eddy Potash, and was clearly prejudiced by the district court's failure to do so." *Id.*; *Wilks v. Young*, 897 F.2d 896, 898 (7th Cir. 1990) (district court erred by failing to instruct the

jury on a theory of liability that was available to the Plaintiff).

That is not the only problem with Instruction No. 22. In addition:

- This instruction did not inform the jury what constitutes an "official policy or custom." The jurors therefore had no guidance as to whether Dr. Jones' memorandum, Ms. Cashman's e-mail messages or Ms. Sens alleged conversations with Dr. Craven constituted an "official policy or custom," or whether they needed additional evidence to satisfy that element of this claim.

- Subparagraph (4) required the jury to find that University Hospital's official policy or custom "deprived the Plaintiff of her constitutional right to freedom of speech." The district erred by submitting this question of law to the jury for its decision. *See Dillard & Sons,* 51 F.3d at 916.

- Subparagraphs (1) through (3) limited the scope of the expressive activities on which Dr. Craven's First Amendment retaliation claim was based just to her one telephone conversation with Dr. Hendrick. That was not the theory of Dr. Craven's case. She claimed retaliation based not only on that one conversation, but also upon her earlier speech in connection with indoor air quality problems resulting from construction activies at the Barbara Davis Center, the storage and disposal of bio-hazardous waste, and other matters.

- Subparagraph (1) required Dr. Craven to prove, by a preponderance of the evidence, that she had expressed "substantial" concerns to Dr. Hendrick "regarding

a radiation spill at 8 North of University Hospital," among other matters (Aplt. App. 362). Dr. Johnson and Ms. Cashman testified that this radiation spill had not occurred on 8 North (Aplt. App. 255, 272). The jurors therefore were required to enter a verdict for University Hospital based upon the legally irrelevant question of the specific location of this incident, as opposed to whether she had reported that incident to Dr. Hendrick.

- Subparagraph (1) also required the jury to find that Dr. Craven had reported to Dr. Hendrick all four of the items (the spill, how it was handled, its adverse effect, and the unavailability of the RSO) in order to prevail on her First Amendment retaliation claim. Dr. Craven argued that the word "and" in that subparagraph should be changed to "or" so that the jurors' decision would not turn on whether they believed that Dr. Craven had reported every single one of those items.

The district court's decision to give Instruction No. 22 to the jury, and its refusal to give Dr. Craven's Tendered Instruction No. 2, was highly prejudicial. Instruction No. 22 set forth the elements of Dr. Craven's First Amendment retaliation claim. In order for the jury to find for Dr. Craven, it had to determine that she had proven facts that supported a legal theory that she had not attempted to present at trial. The district court refused to give an instruction that would have allowed the jury to enter a verdict for Dr. Craven based upon evidence that she did present at trial and upon a well-established basis for recovery in a §1983 claim. Instruction No. 22 was incomplete, confusing, and required the jurors to find for University Hospital if they concluded that Dr. Craven had failed to establish evidence that was legally irrelevant to

her claim for relief. This Court should reverse the judgment entered in this case on Dr. Craven's First Amendment claim, and should remand this case for a new trial in front of a properly instructed jury.

II. THE DISTRICT COURT ERRED IN CONCLUDING THAT UNIVERSITY HOSPITAL WAS NOT LIABLE ON DR. CRAVEN'S CLAIM OF TERMINATION OF EMPLOYMENT IN VIOLATION OF PUBLIC POLICY, ON THE GROUND THAT TERMINATION OF HER EMPLOYMENT DID NOT RESULT FROM THE OPERATION OF A PUBLIC HOSPITAL.

Dr. Craven alleged in her Complaint that University Hospital had terminated her employment in violation of public policy. Specifically, Dr. Craven's Complaint alleged that University Hospital terminated her employment "in retaliation for her refusal to accede to conduct she reasonably believed to be contrary to a clearly expressed public policy relating to the public health, safety or welfare and/or which she reasonably believed to be violative or her legal rights or privileges as a worker" (Aplt. App. 4). *See generally Martin Marietta Corp. v. Lorenz*, 823 P.2d 100 (Colo. 1992) (holding plaintiff had stated claim upon which relief could be granted based on discharge allegedly for having refused to commit felony fraud); *Rocky Mountain Hosp. and Med. Service v. Mariani*, 916 P.2d 519 (Colo. 1996) (recognizing claim for C.P.A. who claimed she was discharged for having refused to engage in allegedly unethical conduct). University Hospital moved for summary judgment on that claim, arguing, *inter*

alia, that this claim was barred by the CGIA. The district court granted that motion on that ground (Aplt. App. 154-58).

In 1971, the Colorado Supreme Court abolished the doctrine of sovereign immunity. *Evans v. Board of County Comm'rs*, 174 Colo. 97, 105, 482 P.2d 968, 972 (1971). That decision abolished that doctrine prospectively, in order to provide the Colorado General Assembly with an opportunity to legislate on this matter before that decision became effective. 174 Colo. At 105-06, 482 P.2d at 972. The Colorado General Assembly responded by enacting the CGIA, §§24-10-101, *et seq.*, C.R.S.

As a political subdivision of the State of Colorado, §23-21-503(1), C.R.S., University Hospital is subject to the provision of the CGIA. That statue, which restored the doctrine of sovereign immunity as a general rule, provides for a waiver of immunity by a public entity in an action for injuries resulting from the "operation of any public hospital, correctional facility ... or jail by such public entity." §24-10-106(1)(b), C.R.S. This statute defines the term "operation" to mean "the act or omission of a public entity or public employee in the exercise and performance of the powers, duties, and functions vested in them by law with respect to the purposes" of that facility. §24-10-103(3)(a), C.R.S.

The district court concluded that the waiver provisions of the CGAA must be interpreted "in a narrow way rather than an expansive way" (Aplt. App. 154). The Colorado Supreme Court has reached the opposite conclusion. Specifically, it has stated that that statue's "waiver provisions are entitled to deferential construction in favor of victims injured by the negligence of governmental agents, while the

immunity provisions are subject to strict construction." *State of Colorado v. Nieto*, 993 P.2d 493, 506 (Colo. 2000); *Walton v. State of Colorado*, 968 P.2d 636, 643 (Colo. 1998).

The Colorado Court of Appeals has held that the CGIA did not bar a claim by a visitor to a State correctional facility who was injured when she allegedly slipped and fell on a wet floor inside the secured visitors' area of that facility. *Flores v. Colo. Dept. of Corrections*, 1999 Colo.App. Lexis 305 (Colo. App. 1999). That court noted:

> A purpose of the facility is to confine persons convicted of crimes safely and effectively. Visitation assists in safe and effective confinement by contributing to offender stability. A visitor program cannot be implemented without providing a secure place within the facility for the visitation to occur.
>
> Accordingly, because the purpose of a correctional facility is to manage convicts safely and effectively, and visitation within the facility directly assists in meeting that purpose, the maintenance of the visitor area within the custodial facility here is directly related to the purpose of the correctional facility.
>
> Hence, the provision of a secure area within the facility for visitation is part of the operation of a correctional facility as defined under the GIA.

(*Id.*) at **6-7 (citations omitted).

The *Flores* opinion distinguished that court's earlier decision in *Pack v. Arkansas Valley Correctional Facility*, 894, P.2d 34, 36-38 (Colo. App. 1995). That decision held that the maintenance of visitor parking areas for a correctional facility "is not directly related to the purpose, as distinct from the operation," of that facility and "merely is ancillary to the purpose of the correctional facility." *Id.* at 37. That court concluded that the statutory duties of the Colorado Department of Corrections, "as they pertain to visitors, specifically are only to search those admitted to the facility and to restrict visitors' entry to the facility except as set forth by prison rules or special permission," and thus relate "not to the visitor but to the purpose of the correctional facility to confine inmates safely and effectively." *Id.*

The district court in this case concluded that this claim did not arise out of the "operation" of a public hospital, and therefore was not exempt from the sovereign immunity provisions of the CGIA. Specifically it concluded "that the entity in question here could have been a widget factory that made widgets, and this claim would still be the same and it really does not go to the true purpose for which the public hospital was operational" (Aplt. App. 158).

That interpretation was far too narrow. In *Flores*, the Colorado Court of Appeals held that the provision of a safe area for visits with convicts is part of the "operation" of a correctional facility. It follows that the job of ensuring the safety of patients, staff and visitors in a public hospital is part of the "operation" of that hospital. The operation of University Hospital is not limited just to providing medical care to its patients. It also includes making sure that patients, staff and visitors are not exposed to radiation, airborne

asbestos fibers and noxious fumes, among other things, and that the public is not endangered as the result of the improper storage and disposal of bio-hazardous wastes.

The district court's decision was erroneous as a matter of law. This Court should reverse its grant of summary judgment to University Hospital on Dr. Craven's public policy claim and should remand this matter to the district court for a new trial.

ORAL ARGUMENT STATEMENT

Dr. Craven requests oral argument in this case. Oral argument would significantly assist the decisional process, by enabling the parties to provide this Court with a clear understanding of the record resulting from the five-day jury trial and the legal issues involved in this case.

CONCLUSION

For the reasons stated herein, Dr. Craven submits that this Court should reverse the judgment entered by the district court on her First Amendment retaliation and public policy claims, and should remand this cause to the district court for a new trial on those claims.

Respectfully submitted,

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CERTIFICATE OF HAND DELIVERY

The undersigned hereby certifies that, on the twenty-second day of May, 2000, a true and correct copy of the above and foregoing Plaintiff-Appellant's Opening Brief was hand delivered to:

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APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Civil Action No. 99-1519

PATRICIA CRAVEN,
Plaintiff-Appellant,
v.

UNIVERSITY OF COLORADO HOSPITAL AUTHORITY,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORDO

THE HONORABLE WILEY Y. DANIEL
DISTRICT COURT JUDGE

DISTRICT COURT CIVIL ACTION NO. 97-D-258

DEFENDANT-APPELLEE'S ANSWER BRIEF

DEFENDANT-APPELLEE REQUESTS ORAL ARGUMENT

I. ISSUES PRESENTED FOR REVIEW

A. **WHETHER, AT TRIAL, THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY ON CRAVEN'S CLAIM FOR VIOLATION OF HER FIRST AMENDMENT RIGHTS.**

B. **WHETHER, ON SUMMARY JUDGMENT, THE DISTRICT COURT PROPERLY DISMISSED CRAVEN'S TORT CLAIM FOR WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY ON THE BASIS OF SOVEREIGN IMMUNITY UNDER THE COLORADO GOVERNMENTAL IMMUNITY ACT.**

II. STATEMENT OF THE CASE

Appellant Patricia Craven (hereinafter "Craven") filed the subject action in the District Court for the City and County of Denver, State of Colorado, on November 8, 1996 asserting claims for breach of implied contract, promissory estoppel, a § 1983 claim for violation of her First Amendment constitutional rights, and wrongful discharge in violation of public policy. [Appendix, pp. 1-6[1]]. Subsequently, as a result of the federal question claim asserted by Craven, this

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[1] Plaintiff-Appellant's Appendix will be referred to as Appendix throughout this brief.

case was removed to the United States District Court for the District of Colorado. [Appendix, p. 407]. After the completion of factual discovery, Appellee, University of Colorado Hospital Authority (hereinafter "University Hospital"), filed a Motion for Summary Judgment asking the District Court to dismiss all Craven's claims. [Appendix, pp. 15-66]. The District Court partially granted the Motion for Summary Judgment only with respect to Craven's claim for wrongful discharge based on violation of public policy [Appendix, p. 155, ll. 5-13] and denied the Motion with respect to Craven's claims for breach of implied contract and promissory estoppel [Appendix, p. 155, l. 16], as well as with respect to Craven's claim for violation of her First Amendment rights under 42 U.S.C. § 1983. [Appendix, p. 158, ll. 15-24.] Thus, this case proceeded to trial on Craven's claims for breach of implied contract and her § 1983 claim for violation of her constitutional rights.[2]

On May 17, 1999, the jury returned a verdict in favor of University Hospital and against Craven on both her breach of implied contract and § 1983 claims. [Appendix, pp. 365-367.] Subsequently, on June 3, 1999, Craven filed a Motion for New Trial or, in the Alternative, to Amend or Alter the Judgment. [Appendix, pp. 368-379.] After said Motion as briefed by the parties, the District Court entered its Order

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[2] Craven's promissory estoppel claim was also remaining at the time of trial. However, since it was an equitable claim, the district court took that claim under advisement until the jury had reached its decision in regard to the other remaining claims. The District Court subsequently also entered judgment in favor of University Hospital with regard to the promissory estoppel claim. Because Craven is not appealing any aspect of that latter claim, it will not be further addressed herein.

dated October 15, 1999 denying that post-trial motion. [Appendix, pp. 397-403.] This appeal ensued.[3] [Appendix, pp. 404-405.]

III. STATEMENT OF THE FACTS

The subject action is an employment dispute arising out of Craven's employment as a Manager of Safety and Risk Management for University Hospital from Mach 21, 1994 through November 8, 1994. [Appendix, p. 181, ll. 9-11; and p. 344]. Craven's performance problems began just weeks after she was hired in May of 1994 when Craven behaved inappropriately at a meeting held to discuss methods for addressing complaints concerning fumes allegedly generated by a construction project. [Appendix II, p. 8, l. 19 - p. 10, l. 18; and p. 26, l. 24 - p. 30, l. 11.[4]] As a result of Craven's conduct at the subject meeting, Craven's supervisor, Ann Jones, Ph.D., issued Craven a written warning letter dated May 24, 1994. [Appendix, pp 348-349.] Craven's performance difficulties continued, and on June 1, 1994, Dr. Jones issued a second written warning, again addressing Craven's non-professional approach to problem-solving. [Appendix, pp. 345-47.] In particular, Dr. Jones noted "...I have observed on several occasions that you still lack the ability to act as a team member in a collegial environment and find workable solutions to safety and facility issues." [Appendix, p. 345.] Subsequently, Craven's line of supervision was changed from Dr. Jones to Ruth Sens, the

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[3] Craven has not appealed any aspect of the jury's verdict with respect to her breach of implied contract claim.

[4] Defendant-Appellee's Appendix will be referred to as Appendix II throughout this brief.

Director of Quality Management at University Hospital. [Appendix, p. 200, ll. 1-10; and Appendix II, p. 4, ll. 6-7.]

Even after Ms Sens became Craven's supervisor, Craven's performance problems continued. [Appendix, II, p. 12, l. 22 - p. 13, l. 10.] Specifically, Craven had personality conflicts with some employees and had difficulties interacting with other employees at University Hospital. [Appendix II, p. 14, l. 7 - p. 18, l. 11.] There were ongoing problems with the manner in which Craven raised safety issues with others. [Appendix II, p. 19, ll. 3-7.]

The difficulties in interpersonal actions culminated in Craven directly contacting Dr. Robert Hendrick to discuss her concerns about Dr. Timothy Johnson as a Radiation Safety Officer, in direct contravention to Ms. Sens' advice. [Appendix II, p. 20, l. 7 - p. 22, l. 4.] As a result of these unresolved performance problems, Ms. Sens decided to terminate Craven due to her lack of trust and confidence in Craven, due to Craven's insubordination, and due to Craven's lack of professionalism. [Appendix II, p. 23, l. 18 - p. 24, ll. 3.] The fact that Craven raised questions about Dr. Johnson's performance as a Radiation Safety Officer did not play any role in Ms. Sens' decision to terminate Craven; rather, Ms. Sens' concern was solely the manner in which these questions were raised. [Appendix II, p. 25, ll. 9-18.]

As a result of her termination, Craven filed the subject civil action from which this appeal then followed. Craven claimed that she was terminated because she spoke out about safety issues, and alleged that a termination under such circumstances violated her First Amendment rights. Craven further claimed that a termination under such circumstances

constituted wrongful discharge in violation of public policy. A review of the District Court record demonstrates that the District Court did not commit error in giving Jury Instruction No. 22, nor in granting University Hospital's Motion for Summary Judgment on Craven's tort claim for wrongful discharge based on public policy. [Appendix, pp. 362-363.] As such, this Court should uphold the judgment entered in favor of University Hospital.

IV. SUMMARY OF ARGUMENT

The District Court properly instructed the jury on Craven's 42 U.S.C. § 1983 claim for violation of her First Amendment rights as the instruction given correctly stated the law. Additionally, objections now made by Craven to the instruction given by the District Court were not raised at trial and thus, have been waived. Craven also failed to tender alternative instructions which correctly stated the law. The only instruction tendered by Craven relating to this § 1983 claim [Appendix, p. 364] was not a correct statement of the law.

The District Court also properly granted University Hospital's Motion for Summary Judgment on Craven's tort claim for wrongful discharge based on public policy, applying the doctrine of sovereign immunity. Specifically, Craven failed to establish on summary judgment that her tort claim fell within any of the exceptions to sovereign immunity under the Colorado Governmental Immunity Act. As such, the underlying decisions of the District Court should be upheld on appeal.

V. ARGUMENT

A. STANDARD OF REVIEW FOR JURY INSTRUCTIONS.

"An error in jury instructions will mandate reversal...only if the error is determined to have been prejudicial after reviewing the record as a whole." *Rios v. Bigler*, 67 F.3d 1543, 1549 (10th Cir. 1995). Jury instructions must be viewed as a whole to determine whether they properly stated the applicable law and provided an ample understanding of the applicable standards. *Dillard & Sons Constr., Inc., v. Burnup & Sims Comtec, Inc.*, 51 F.3d 910, 915 (10th Cir. 1995); *Rios, supra.* The instructions need not be entirely free from fault, but they may not serve to mislead the jury in any way. *Dillard, supra.* Thus, no new trial is required where the jury instructions given correctly state that applicable law. *Dillard, supra.*

B. THE JURY INSTRUCTIONS GIVEN BY THE DISTRICT COURT FOR CRAVEN'S FIRST AMENDMENT CLAIM WERE PROPER.

One of Craven's claims at the time of trail was a 42 U.S.C. § 1983 claim for violation of her First Amendment rights. Consequently, the District Court and the parties had to craft an instruction setting forth the elements of that claim, including the element of government entity liability and University Hospital's affirmative defense. The resulting product was Instruction No. 22. [Appendix, p. 362-63.]

Craven made some objections to Instruction No. 22 at trial [Appendix II, p. 32, l. 19 – p. 46, l. 1; and p. 47, l. 3 –

p. 60, l. 11], and in fact, tendered an alternative Instruction - Craven's tendered Instruction No. 2 [Appendix, p. 364] - which was rejected by the District Court. [Appendix II, p. 45, l. 1 - p. 46, l. 1; and p. 58, ll. 2-10]. Specifically, Craven is critical of Instruction No. 22 because of its alleged failure to correctly define liability against University Hospital as a government entity. Craven also complains that the District Court failed to define the term "official policy or custom." Finally, Craven criticizes the factual components of Instruction No. 22. All of these complaints lack merit.

The District Court properly instructed the jury on Plaintiff's § 1983 claim for violation of her First Amendment rights; thus, the jury's verdict should stand. The leading 10th Circuit decision describing the analysis to be employed with response to First Amendment retaliation claims is *Gardetto v. Mason*, 100 F.3d 803, 811 (10th Cir. 1996). Indeed, that very analysis was employed by the District Court in crafting the disputed Instruction No. 22 in this case and the holdings of that case have been included in the language of the disputed instruction. [Appendix II, p. 6, l. 5 - p. 7, l. 6; and Appendix, pp. 362-63]. Thus, the instruction sets forth the applicable test.

Additionally, the leading decision describing the circumstances in which governing bodies can be sued under 42 U.S.C. § 1983 is *Monell v. Department of Soc. Serv.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed.2d 611 (1978). In that case, the United States Supreme Court held that the prerequisite for such a claim under § 1983 was the existence of an unconstitutional official policy or custom. *Monell*, 436 U.S. at 2036. As paragraph 4 of Instruction No. 22 given by the District Court mirrored this standard, the jury instruction

properly and adequately set forth the applicable law. Moreover, even Craven herself does not dispute that *Monell* states the proper standard for liability under § 1983. [Appendix II, p. 37, ll. 3-7.]

Further, the given Instruction No. 22 was consistent with the evidence presented by Craven at trial, namely, that University Hospital had an official policy or custom requiring her to report all health and safety concerns only to her supervisors. [Appendix, p. 200, ll. 12-22; and Appendix II, p. 11, ll. 16-19.] Thus, in addition to stating the applicable law, the instruction was consistent with at least one theory of the case developed through the evidence presented by Craven. Accordingly, there was no prejudice to Craven in the giving of Instruction No. 22 to the jury.

Craven argues that the District Court should have accepted her proposed version of subject instruction, designated as Craven's tendered Instruction No. 2 [Appendix, p. 364], as a substitute for the version given by the District Court. However, Craven's tendered instruction is, itself, not a correct statement of the law and, accordingly, would have constituted error. Craven's tendered instruction eliminated the element of establishing an unconstitutional custom or policy. Instead, that instruction only required that a final policymaker make the decision to terminate Craven or approve a subordinate's decision and the basis for it. Those findings alone are insufficient to establish § 1983 liability. Specifically, as the United State Supreme Court has held, every decision by a government official does not automatically subject a government entity to § 1983 liability. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292, 1299, 89 L. Ed.2d 452 (1986).

In rejecting Craven's tendered instruction, the District Court specifically found that one method of establishing an official policy or custom was through a decision made by a final policymaker; however, there must still be a finding of policy through a single action. [Appendix II, p. 57, ll. 8-16]. *See City of St. Louis v. Praprotnick*, 485 U.S. 112, 108 S. Ct. 915, 924, 99 L. Ed.2d 107 (1988). Since Craven's tendered instruction eliminated this element, it was properly rejected by the District Court as an incorrect statement of law, and also as an unbalanced instruction. [Appendix II, p. 45, l. 1 – p. 46, l. 1; and p. 58, ll. 2-10.]

An additional defect in Craven's tendered instruction is that it instructs jurors that a mere approval by a policymaker of a decision to terminate Craven is sufficient to satisfy the fourth element of the instruction. It included no requirement that the basis for the termination be unconstitutional or unlawful. The lack of any such requirement was also not a proper statement of the law. *See*, *Pembaur*, 106 S. Ct. at 1300 (where the United States Supreme Court held that governmental liability can attach to a single decision if it results in unlawful action by a final policymaker.).

Moreover, the evidence presented by Craven at trial did establish that any University Hospital employee with final policy-making authority approved any unconstitutional or unlawful bases for terminating Craven. Rather than meeting this requirement, Craven suggested that the mere approval of her termination was an approval of unconstitutional activity. Such evidence is insufficient to meet Craven's burden in proving a violation of her constitutional rights, particularly since the exercise of a discretionary function alone by a final

policymaker is insufficient to establish § 1983 liability. *Pembaur*, 106 S. Ct. at 1299. Accordingly, this additional reason further justifies the District Court's refusal to utilize Craven's tendered Instruction No. 2, as it did not comport with the evidence presented by Craven, nor the applicable law.

Craven also finds fault with the submitted version of Instruction No. 22 as it did not define "official policy or custom" Under Fed.R.Civ.P. 51, "[n]o party may assign as error the giving or failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." Where the party fails to specifically object at trial to a defect in a jury instruction, that party waives its right to claim error in the jury instructions. *Unit Drilling Co. v. Enron Oil & Gas Co.*, 108 F.3d 1186, 1190 (10th Cir. 1997).

At no time during the various jury instruction conferences at trial in this case did Craven object to Instruction No. 22 on the basis that the District Court failed to provide a definition of an official policy or custom. [Appendix II, p. 5, l. 11 – p. 7, l. 20; p. 32, l. 19 – p. 46, 1; and p. 47, l. 3 – p. 60, l. 11.] More significantly, Craven failed to even tender a proposed instruction to the District Court defining the term official policy or custom.[5] Since none

[5] Craven only tendered three instructions at trial which were refused. [Appendix II, p. 31, ll. 19-21; p. 37, ll. 16-25; and p. 44, l. 9 – p. 46, l. 1; and p. 61, l. 4 – p. 63, l. 6.] None of the tendered alternative instructions included a definition of official policy or custom. [Appendix, p. 364 and Appendix II, pp. 64-65.]

of the instructions tendered by Craven contained a definition of the term official policy or custom, Craven waived this particular objection to Instruction No. 22 under the *Unit Drilling* decision.

Craven also questions paragraph 4 of Instruction No. 22 on the basis that the District Court improperly submitted a question of law to the jury. Since the necessary element under the *Monell* decision is the existence of an unconstitutional official policy or custom, paragraph 4 properly stated the law; as such, this instruction was not prejudicial to Craven. Secondly, the case law cited by Craven, *e.g.*, *Dillard, supra*, does not stand for the proposition that a trial court may not submit the issue of the unconstitutionality of the official policy or custom to the jury.[6] Thus, Craven has failed to cite any case law in support of this argument. Moreover, as Craven also failed to raise this issue at trial [Appendix II, p. 5, l. 11 - p. 7, l. 20; p. 32, l. 19 - p. 46, l. 1; and p. 47, l. 3 - p. 60, l. 11], she has waived the right to object to this error. *Unit Drilling, supra*.

Craven also criticizes paragraphs 1 and 3 of Instruction No. 22 based on her desire to have that instruction include a wider range of speech activities. In particular, Craven argues that her speech concerning indoor air quality problems and the disposal of biohazardous waste should also have been included in the instruction. However, Craven's Opening Brief fails to direct this Court to evidence in the record supporting such an instruction. Craven also failed to raise this issue on the record at the time of the jury instruction conferences.

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[6] Rather, *Dillard* stands for the general proposition that a District Court errs in submitting a question of law to the jury.

[Appendix, p. 5, l. 11 – p. 7, l. 20; p. 32, l. 19 – p. 46, l. 1; and p. 47, l. 3 – p. 60, l. 11.] Furthermore, Craven's tendered Instruction No. 2 mirrored the language used by the District Court, and did not provide alternative language including these other speech activities. [Appendix, p. 364.] Accordingly, this alleged error was also waived. *Unit Drilling, supra.*

Craven also raised a concern that paragraph 1 contained a specific reference to Wing 8 North of University Hospital, where an alleged radiation spill had occurred, which evidence was contradicted by defense witnesses, Dr. Johnson and Joyce Cashman. Significantly, Craven's Opening Brief completely ignores the fact that her own testimony at trial was the source of the language contained in paragraph 1 regarding the location of the radiation spill on 8 North. [Appendix, p. 221, ll. 19-20.] Thus, the version of the instruction given by the District Court was factually supported by the record. Moreover, even Craven's tendered instruction utilized the 8 North reference. [Appendix, p. 364.] As such, Craven can hardly claim prejudice with respect to a jury instruction consistent with her own testimony and consistent with her own tendered instruction.

Finally, Craven argues error with paragraph 1 of Instruction No. 22 given by the District Court due to the inclusion of four different topics in the conversation between Dr. Craven and Dr. Hendrick. Although that issue was raised by Craven at the jury instruction conferences [Appendix II, p. 45, ll. 4-17], that requested modification to Instruction No. 22 was rejected by the District Court as being inconsistent with Craven's own testimony at trial. [Appendix II, p. 45, l. 20 – p. 46, l. 1.] Instead, the District Court decided to use the

version of Instruction No. 22, as it was consistent with Craven's testimony. [Appendix, p. 220, l. 9 - p. 223, l. 12.] Accordingly, the instruction was supported by the record and does not constitute error in this regard.

In summary, Craven has failed to point to any legal errors or substantial prejudice in the giving of Instruction No. 22 to the jury. Moreover, those objections which Craven failed to raise at the time of trial are now waived. Finally, given that Instruction No. 22 was factually consistent with Craven's own testimony, she cannot claim prejudice in the giving of this instruction. For the foregoing reasons, this Court should sustain the verdict of the jury on Craven's § 1983 claim and decline to grant Craven a new trial based on the alleged errors in Instruction No. 22.

C. STANDARD OF REVIEW APPLICABLE TO SUMMARY JUDGMENT.

Summary judgment is appropriate when the pleadings, affidavits, depositions, or admissions establish that there is no genuine issue as to any material fact and the moving party is, therefore, entitled to summary judgment as a matter of law. Fed.R.Civ.P. 56(c); *MacDonald v. Delta Airlines, Inc.*, 94 F.3d 1437, 1440 (10th Cir. 1996). On appeal, an appellate court's review of the propriety of summary judgment is a de novo review, utilizing the same legal standards as the district court employed. *Jensen v. Redevelopment Agency of Sandy City*, 998 F.2d 1550, 1555 (10th Cir. 1993); *MacDonald, supra*.

D. THE DISTRICT COURT PROPERLY DISMISSED CRAVEN'S CLAIM FOR WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY ON SUMMARY JUDGMENT.

The Colorado Governmental Immunity Act (hereinafter "CGIA") provides immunity for public entitles for all claims which lie in tort or could lie in tort unless there is an explicit wavier of that immunity under § 24-10-106(1), 7 C.R.S. (1999). In this case, it was undisputed that University Hospital is a public entity under the CGIA. § 24-10-103(5), 7 C.R.S. (1999); *Colorado Assoc. of Pub. Employees v. Board of Regents*, 804 P.2d 138, 142-44 (Colo. 1990). It was also undisputed that Craven's claim for wrongful discharge in violation of public policy is a tort claim. *Lorenz v. Martin Marietta Corp., Inc.*, 802 P.2d 1146, 1148 (Colo. App. 1990).

As such, unless one of the noted exceptions to the CGIA applies, University Hospital is immune with respect to Craven's tort claim for wrongful discharge in violation of public policy. Craven argues that the applicable exception is subsection (1)(b) of § 24-10-106, 7 C.R.S. (1999), as she contends that her claim arises from the operation of a public hospital. Operation is defined by the CGIA as "the act or omission of a public entity or public employee in the exercise and performance of the powers, duties, and functions vested in them by law with respect to the purpose of any public hospital...." § 24-10-103(3)(a), 7 C.R.S. (1999). There is no Colorado case law specifically interpreting the purposes of a public hospital.

However, in *Plummer v. Little*, 987 P.2d 871, 875

(Colo. App. 1999), the Colorado Court of Appeals held that the General Assembly intended the waiver of immunity for the "operation of a public hospital" to be limited. As such, the *Plummer* Court refused to expand the waiver provision to include facilities other than those that provide specific hospital services generally relating to inpatient care. *Plummer, supra.* Similarly, this Court should not expand the purposes of a public hospital to include ancillary matters beyond patient care, such as internal employment disputes. Such an interpretation would be an expansive interpretation of the waiver provision, including the term "operation of a public hospital", contrary to the *Plummer* decision. Since the issue raised herein has not to date been fully resolved by the Colorado Supreme Court, this Court must apply the existing substantive law of the forum state and reach the same decision this Court believes that the Colorado Supreme Court would. *See, Robbins v. Jefferson County Sch. Dist. R-1*, 186 F.3d 1253, 1260 (10th Cir. 1999).

There is also case law from the Colorado Court of Appeals construing the purpose of public jail facilities, which facilities are included in the list of facilities under the wavier provision set forth at § 24-10-106(1)(b), 7 C.R.S. (1999). In the first decision, *Pack v. Arkansas Valley Correctional Facility*, 894 P.2d 34, 37 (Colo. App. 1995), the Court determined that the primary purpose of a correctional facility is to safely and effectively confine persons convicted of crimes. The Court also indicated that the "operation" of such a correctional facility does not include the maintenance of a parking lot. *Pack*, 894 P.2d at 36. Because the *Pack* Court held that the maintenance of a visitors' parking lot was ancillary to the purpose of a correctional facility, the Court in that case held that there was no waiver of immunity by the

correctional facility as a government entity. *Pack*, 894 P.2d at 37. In the subsequent decision issued by the Colorado Court of Appeals, *Flores v. Colorado Dept of Corrections*, 1999 WL 1067487 (Colo. App. 1999), *cert. denied*, 00 SC 22, the Court reaffirmed the purpose of a correctional facility as described by the *Pack* Court, but held that the maintenance of a visitor area inside the custodial facility, unlike the maintenance of an exterior visitor's parking lot, was directly related to the purpose of the correctional facility.

While these two cases are difficult to reconcile factually, and while they do not definitively construe the purpose of a public hospital, these cases do uniformly stand for the proposition that some functions of governmental facilities will be ancillary to the purpose of the facilities and thus not subject to wavier of immunity. *Pack, supra*, and *Flores, supra*. Remaining unresolved is, therefore, what constitutes an ancillary function. Thus, further legal analysis is required to adequately answer this question.

The primary purpose of University Hospital is to serve as a teaching hospital and provide health care services to the citizens of the State of Colorado. *See*, § 23-21-501, 7 C.R.S. (1999). Thus, unless Craven's claims in the subject employment action directly relate to this purpose, there is no waiver of immunity under the CGIA.[7] *Pack, supra*, and *Flores, supra*.

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[7] In this regard, it is important to note that the obvious purpose of the waiver of immunity for public hospitals it to ensure that there is a remedy for tortuous conduct arising out of patient care, namely, medical malpractice claims. *See, Farina v. City and County of Denver*, 940 P.2d 1004, 1005 (Colo. App. 1996).

Additionally, while there is an absence of guidance from the Colorado Supreme Court directly addressing the issue of the purpose of the hospital, there is authority on point from the United States District Court for the District of Colorado, which is persuasive. In *Neiberger v. Hawkins*, 70 F. Supp.2d 1177, 1193 (D. Colo. 1999), it was held that sovereign immunity is waived only if the questioned activities relate to the hospital's purpose, which the court found to include the provision of care and treatment to patients. *Neiberger*, 70 F. Supp.2d at 1194.

In this case, Craven's claims do not relate to the provision of health care services; rather, her claims arise solely from her employment relationship with University Hospital and the termination of that relationship. [Appendix, pp. 1-6.] The fact that Craven's job responsibilities included hospital safety issues [Appendix II, p. 1, l. 6 – p. 2, l. 11] does not change this result. In addressing the very issue of a safe work place environment, the United States District Court for the District of Colorado has also held that maintaining a safe work place at a sanitation facility is not related to that facility's purpose; rather, maintaining a safe work environment is, at best, ancillary to the purpose of operating the facility, and therefore barred by the CGIA. *Dobson v. City and County of Denver*, 81 F. Supp. 2d 1080, 1088-89 (D. Colo. 1999).

Similarly, addressing safety issues as part of one's job responsibilies at a hospital facility is also ancillary to the hospital's purpose and functioning. Accordingly, the mere fact of Craven's position as the Manger of Safety and Risk Management [Appendix II, p. 1, l. 6 – p. 2, l. 11], is insufficient to raise her employment claims to the type of

claims related to a hospital facility's purpose. To do so would hinge immunity on a plaintiff's job description, rather than focusing on the purpose of the facility in question.

Furthermore, different standards of sovereign immunity should not be applied o employees in varying positions, nor to different public employees, based on their specific employer and whether that public employer is of the type referenced in § 24-10-106(1)(6), 7 C.R.S. (1999). For example, the CGIA makes no distinction between employees who work in the safety arena and employees who work in other areas, such as maintenance. Craven's tort claims should not be treated differently because she was employed as the Manager of Safety and Risk Management. To do so would create a special status for safety managers under the CGIA. That would not be a logical distinction.

There is also no logical justification for treating the employment tort claims of hospital employees differently from the employment tort claims of employees of other public entities. There are only three public entities included in the waiver provision set forth in § 24-10-106(1)(6), public hospitals, correctional facilities, and jails. Hospitals are included to ensure that public entities take responsibility for medical malpractice claims. See *Farina*, 940 P.2d at 1005. Correctional facilities and jails are included because they stand in a custodial type of relationship vis-à-vis prisoners. Thus, there are public policy reasons for providing a waiver of immunity for these types of institutions. Conversely, there are no identifiable public policy reasons for waiving immunity for these particular institutions for claims arising from employment disputes.

Moreover, it defies logic for the Court to treat Craven's tort claims differently just because she worked for a public hospital, as Craven is urging this Court to do. For example, there is no justification for treating the employment tort claims of a hospital employee differently from the employment tort claims of an employee of a school district or recreational district. All tort-based employment claims of public employees should be treated similarly under the CGIA irrespective of the category of the employer. Accordingly, Craven's employment tort claim against University Hospital as a public hospital for wrongful discharge in violation of public policy should be barred by the CGIA as are all other such claims.

In summary, since Craven's claims arise exclusively out of her employment relationship with University Hospital, they do not satisfy any of the noted exceptions to sovereign immunity set forth in the CGIA, and as such, the District Court properly dismissed craven's claim for wrongful discharge in violation of public policy upon summary judgment.

VI. CONCLUSION

The District Court properly instructed the jury on Craven's § 1983 claim for violation of her First Amendment rights. The District Court also correctly dismissed Craven's tort claim for wrongful discharge based on public policy upon Motion for Summary Judgment due to the lack of any waiver of immunity under the Colorado Governmental Immunity Act. As such, this Court should uphold the decisions of the District Court.

VII. JUSTIFICATION FOR ORAL ARGUMENT

In the event that this Court deems it appropriate, University Hospital requests oral argument to address any questions the Court may have regarding the facts of this case or the application of the pertinent law to those facts. Oral argument may assist the court in deciding these issues.

Respectfully submitted,

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APPENDIX F

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Civil Action No. 99-1519

PATRICIA CRAVEN,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
UNIVERSITY OF COLORADO HOSPITAL AUTHORITY,	)
	)
Defendant-Appellee.	)
	)

PLAINTIFF-APPELLANT'S REPLY BRIEF

COMES NOW the Plaintiff-Appellant, by and through her attorneys, Roseman & Kazmierksi, LLC, and respectfully submits the following Reply Brief herein:

QUESTIONS PRESENTED FOR REVIEW

The following questions are presented for review in this case:

1. Whether the district court erred in refusing to instruct the jury on Dr. Craven's theory that University Hospital was liable for a single decision, allegedly made in retaliation for the exercise of her First Amendment rights, if

a person with final policymaking authority approved that decision and the basis for it; and

2. Whether the district court erred in concluding that University Hospital was not liable on Dr. Craven's claim of termination of employment in violation of public policy, on the ground that the termination of her employment did not result from the operation of a public hospital.

STATEMENT OF THE CASE

Summary of the Facts. The Answer Brief filed by the University of Colorado Hospital Authority (hereinafter, "University Hospital") contains a series of statements in which it summarized the testimony of its own witnesses on direct examination as if that testimony were undisputed. For example, University Hospital claimed that Dr. Craven behaved inappropriately" at a meeting in May 1994 (Defendant-Appellee's Answer Brief, at 2) and that her "performance problems continued" after Ruth Sens became her supervisor (*Id.*, at 2). Dr. Craven presented a summary of the testimony by both her own and University Hospital's witnesses in her Opening Brief (Plaintiff-Appellant's Opening Brief, pp. 1-9). On the points just mentioned, Dr. Craven notes that, only four days after the May 1994 meeting, her immediate supervisor sent her an e-mail message (Aplt. App. 324), stating that she thought Dr. Craven was "doing a nice job, and it is nice to have you here." Ms. Sens' draft memorandum for a five-day suspension of Dr. Craven did not discuss, in the section of the document addressing areas of needed improvement, Dr. Craven's alleged personality conflicts with other employees and alleged difficulties interacting with other employees (Aplt. App. 335). The only

event listed in Ms. Sens' termination letter (Aplt. App. 344) that occurred during Ms. Sens' supervision of Dr. Craven was Dr. Craven's telephone call with Dr. Hendrick.

University Hospital summarized Ms. Sens' testimony, on direct examination, that the fact that Dr. Craven had raised concerns about Dr. Johnson's performance as University Hospital's Radiation Safety Officer allegedly played no role in her decision to terminate Dr. Craven's employment (*see* Defendant-Appellee's Answer Brief, at 4). However, under cross-examination, Dr. Craven impeached Ms. Sens through her deposition testimony that her statement in her termination letter about Dr. Craven's alleged lack of professional behavior referred to Dr. Craven's "contacting Dr. Hendrick and allegedly what she told him" (Aplt. Second Supp. App. 2-3). In addition, University Hospital failed to present any competent evidence that "the manner in which these questions were raised" (Defendant-Appellee's Answer Brief, at 4) was improper or inappropriate. Dr. Hendrick did not recall Dr. Craven as being angry, upset or saying anything in a loud or confrontational tone of voice, and in fact recalled nothing unusual about that conversation (Aplt. App. 229).

ARGUMENT

I. THE DISTRICT COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON DR. CRAVEN'S THEORY THAT UNIVERSITY HOSPITAL WAS LIABLE FOR A SINGLE DECISION, ALLEGEDLY MADE IN RETALIATION FOR THE EXERCISE OF HER FIRST AMENDMENT RIGHTS, IF A PERSON WITH FINAL POLICYMAKING AUTHORITY APPROVED THAT DECISION AND THE BASIS FOR IT.

Dr. Craven has argued previously (Plaintiff-Appellant's Opening Brief, at 12-16) that the district court erred in giving Instruction No. 22 to the jury because that instruction did not correctly summarize her theory of liability against University Hospital for First Amendment retaliation. *See Harrison v. Eddy Potash, Inc.*, 158 F.3d 1371, 1377 (10th Cir. 1998); *Wilks v Young*, 897 F.2d 896, 898 (7th Cir. 1990). Dr. Craven's Complaint alleged that University Hospital had retaliated against her for her expression of her views on matters of public concern and that its managers "had final policymaking authority with respect to [her] employment" (Aplt. App. 5). One of the elements of her Tendered Instruction No. 2 (Aplt. App. 364) was that a "person with final policy-making authority for University Hospital with respect to her employment either decided to terminate her employment or approved a subordinate's decision and the basis for it." That element of liability did not appear in Instruction No. 22. Instead, that instruction informed the jurors that they were to find for Dr. Craven if

they found, *inter alia*, that University Hospital "had an official policy or custom, which required [her] to report all health and safety concerns associated with her job duties only to a supervisor."

University Hospital has argued that Instruction No. 22 correctly stated the law. In particular, University Hospital has argued that had the jurors found that a final policymaker had made the decision to terminate Dr. Craven's employment or had approved a subordinate's decision and the basis for it, "[t]hose findings alone [would be] insufficient to establish §1983 liability" (Defendant-Appellee's Answer Brief, at 8). University Hospital argued that "there must still be a finding of policy through a single action" (*Id.*).

University Hospital's arguments are based upon an incorrect view of the applicable legal standards. Three of this Court's decisions show how University Hospital's approach, and that taken by the district court, are erroneous.

In *Starrett v. Wadley*, 876 F.2d 808 (10th Cir. 1989), the plaintiff had complained to Robert Wadley, who was then the Assessor for Creek County, Oklahoma, about his sexual harassment of her and about his drinking problems. 876 F.2d at 812. She then complained to Mr. Wadley's attorney and to the Chairman of the Board of County Comissioners about these issues. *Id.* After her attorney wrote a letter to Mr. Wadley, stating that his sexual harassment of her violated Title VII and warning him not to retaliate against her, Mr. Wadley terminated her employment for alleged "budgetary" reasons. *Id.* This Court concluded that "Wadley's act of firing plaintiff was an act of the County because Waldey had final authority to set employment policy as to the hiring and

firing of his staff." *Id.* at 818.

There was no evidence of any County policy prohibiting any County employee from complaining about sexual harassment to the alleged harasser, his attorney or the Chairman of the Board of County Commissioners. There was no policy prohibiting any County employee from retaining an attorney to represent her in connection with a claim of sexual harassment. Instead, because "the County had delegated to Wadley the power to establish final policy concerning hiring and firing personnel within his department, the County is liable for Wadley's conduct in that regard." *Id.* at 819.

In *Flanagan v. Munger*, 890 F.2d 1557 (10th Cir. 1989), high-ranking officers with the Colorado Springs Police Department held partnership interests in a video rental store that rented, as less than 4% of its inventory, adult films. 890 F.2d at 1560. James Munger, Colorado Springs' Chief of Police, issued written reprimands to those officers for alleged violations of departmental policies concerning standards of conduct, conduct unbecoming an officer, and obtaining approval for off-duty employment. *Id.* at 1561. Those officers alleged that Chief Munger had violated their First Amendment and other rights. *Id.* This Court held that the City's admission that Chief Munger had final authority to issue reprimands to Colorado Springs police officers "effectively disposes of the municipal liability issue because it all but flatly states that Chief Munger was the final policymaker with respect to issuing written reprimands in the department." *Id.* at 1568. This Court concluded that "when Chief Munger issued the reprimands against plaintiffs, he acted as the official responsible for establishing final policy with respect to the subject matter in question," and that his

"unconstitutional reprimand may be imputed to the City for purposes of municipal liability." *Id.* at 1569 (citation and internal quotation marks omitted).

There was no evidence that the City of Colorado Springs had any policy restricting the First Amendment rights of any its employees. There was no evidence that Chief Munger was merely implementing a policy that restricted police officers' ownership interests in businesses that rented adult films to members of the public. Yet this Court not only reversed the district court's grant of summary judgment to the City on this issue, but also granted summary judgment to the plaintiffs and remanded the case to the district court for a determination of remedies on their First Amendment claim against the city.

This court reached a similar result based on similar reasoning in *Randle v. City of Aurora*, 69 F.3d 441 (10th Cir. 1995). Ms. Randle, an Asian woman of Filipino nationality, claimed that the City Manager, Finance Director and Human Resource Director of the City of Aurora were liable to her for alleged racial discrimination pursuant to 42 U.S.C. §§1983 and 1981. After reviewing the applicable precedents and the facts in that case, 69 F.3d at 447-50, this Court concluded that a genuine issue of material fact existed as to whether those City officials exercised final policymaking authority in the area of personnel matters and therefore reversed the district court's grant of the City's motion for summary judgment. *Id.* at 450.

This Court also concluded that Ms. Randle had failed to establish a genuine issue of material fact as to whether the City had a custom or usage of discriminatory employment

practices. *Id.* at 447. As in *Starrett* and *Flanagan*, there was no evidence that the City had adopted a policy of discriminating against any of its employees on the basis of race. The only issue was whether those three City officials were final policymakers. It identified three elements that helped determine whether an individual meets that test: "(1) whether the official is meaningfully constrained by policies not of that official's own making; (2) whether the official's decisions are final -- i.e., are they subject to any meaningful review; and (3) whether the policy decision purportedly made by the official is within the realm of the official's grant of authority." *Id.* at 448 (internal quotation marks omitted).

As Dr. Craven has argued previously (Plaintiff-Appellant's Opening Brief, at 15-16), Dennis Brimhall, University Hospital's President, and Joyce Cashman, its Vice President of Operations, had final policymaking authority with respect to the termination of Dr. Craven's employment. University Hospital's appeal procedure (Aplt. App. 341) provided that the decision of its President on an employee appeal "is final." Ms. Cashman, who testified in a portion of her deposition that was read at trial that Ms. Sens needed her approval in order to terminate Dr. Craven's employment (Aplt. App. 294), stated in writing that she approved of that decision because Dr. Craven had discussed her concerns about the Radiation Safety Officer position with Dr. Hendrick (Aplt. App. 355-56). Mr. Brimhall stated in writing that he had decided to uphold that termination decision based "[u]pon a complete review of your grievance material and intensive interviews" with the individuals directly involved with that decision (Aplt. App. 343). University Hospital has not argued that either Mr. Brimhall or Ms. Cashman lacked final policymaking authority with respect to the termination of Dr.

Craven's employment (*see* Defendant-Appellee's Answer Brief, at 6-9).

University Hospital has argued that the district court employed the analysis contained in this Court's decision in *Gardetto v. Mason*, 100 F.3d 803, 811 (10th Cir. 1996), in crafting Instruction No. 22 (Defendant-Appellee's Answer Brief, at 6-7). That is not accurate. *Gardetto* did not deal with the liability of a municipality for a single decision by a person with final policymaking authority. Instead, that decision discussed the requirement that a public employee's speech can be "fairly characterized as constituting speech on a matter of public concern," *Connick v. Myers*, 461 U.S. 138, 146 (1983); the balancing test between the employee's interests, as a citizen, in commenting upon matters of public concern against "the interest of the State, as an employer, in promoting the efficiency of the public service it performs through its employees," *Pickering v. Bd. of Education*, 391 U.S. 563, 568 (1968); whether the protected speech was a substantial factor or a motivating factor in the employment decision at issue; and whether the employer would have reached the same decision even in the absence of the protected conduct. *See* 100 F.3d at 811. The district court found that Dr. Craven's speech met the *Connick* test (Aplt. App. 230-31) and that the *Pickering* test weighed in her favor (Aplt. App. 232-33, 296-97). Instruction No. 22 also covered the issues of substantial or motivating factor and University Hospital's affirmative defense of termination for other constitutionally permissible reasons or motives (Aplt. App. 362-63).

Instruction No. 22 failed to provide the jury with any guidance on the theory of liability for Dr. Craven's First Amendment retaliation claim. It instructed the jurors to find

in her favor on that claim only if they concluded, by a preponderance of the evidence, that a paragraph in the "corrective actions you should take" section of a written warning letter by Dr. Ann Jones (Aplt. App. 346) and a comment contained in an e-mail message by Ms. Cashman (Aplt. App. 333) constituted an "official policy or custom" of University Hospital. The district court's decision to give that instruction, and not to instruct the jury on Dr. Craven's theory of liability, was both erroneous and prejudicial to her. *See* Buzek v. County of Saunders, 972 F.2d 992, 996 8th Cir. 1992) (approving instruction that stated that a single decision by the County Sheriff to terminate the employment of a deputy sheriff could reflect official County policy "provided that a deliberate choice to follow a course of action was made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question").

University Hospital has also presented a series of arguments concerning other problems that Dr. Craven had identified earlier (Plaintiff-Appellant's Opening Brief, at 16-17) with Instruction No. 22. In particular:

- University Hospital, while conceding that Instruction No. 22 did not define the term "official policy or custom," argued that Dr. Craven had waived that issue by not objecting specifically to that defect before the instruction was presented to the jury (Defendant-Appellee's Answer Brief, at 9-10). In reality, Dr. Craven raised this issue during the instruction conference by submitting her Tendered Instruction No. 2 (Aplt. App. 364), under which the jurors could have found the existence of an official policy or custom through the decision of a person with final policymaking authority with

respect to her employment. Dr. Craven also raised this issue in a post-trial motion (Aplt. App. 373). Even if this Court concludes that Dr. Craven did not properly raise this objection prior to the jury's verdict, it can review Instruction No. 22 for plain error. *Unit Drilling Co. v. Enron Oil & Gas Co.*, 108 F.3d 1186, 1190-91 (10th Cir. 1997). An instruction that failed to inform the jury as to the meaning of the critical legal concept of "official policy or custom" was both patently plainly erroneous and prejudicial to Dr. Craven. *Id.*

- Dr. Craven also had argued previously (Plaintiff-Appellant's Opening Brief at 16) that Instruction No. 22 impermissibly submitted a question of law to the jury. University Hospital, while conceding that it is improper for a district court to submit a question of law to a jury (Defendant-Appellee's Answer Brief, at 10 n. 6), claimed that Dr. Craven failed to raise that issue at trial and therefore waived the right to object to this error (*Id.*, at 10-11). In fact, Dr. Craven addressed this issue by presenting her Tendered Instruction No. 2 (Aplt. App. 364), which did not contain the language in Instruction No. 22 that any policy or custom by University Hospital "deprived the Plaintiff of her constitutional right to freedom of speech" (*see* Aplt. App. 362). Dr. Craven also raised this issue in a post-trial motion (Aplt. App. 373-74).

- Dr. Craven has argued in this Court that subparagraphs (1) through (3) of Instruction No. 22 impermissibly limited the scope of the expressive activities on which her First Amendment retaliation claim was based just to her one telephone conversation to Dr. Hendrick (Plaintiff-Appellant's Opening Brief, at 16-17). University Hospital argued that Dr. Craven had failed to raise this issue on the record at the time of the jury instruction conferences and did

not include alternative language in her Tendered Instruction No. 2 (Defendant-Appellee's Answer Brief, at 11). That argument is not accurate. She argued in the instruction conference that the description of her expressive activities in Instruction No. 22 was too narrow (Aplt App. 279). She also provided the district court with another version of her Tendered Instruction No. 2 that contained a broader description of those expressive activities (Aplt. App. 280). This Court has held that Fed.R.Civ.P. 51 "does not require the submission of a written instruction to preserve the issue [of an objection to a jury instruction] for appeal." *Unit Drilling*, 108 F.3d at 1190 n. 5.

- Dr. Craven has argued previously (Plaintiff-Appellant's Opening Brief, at 17) that Instruction No. 22 erred by requiring, as one of the elements of her First Amendment retaliation claim, that she had expressed "substantial" concerns to Dr. Hendrick "regarding a radiation spill at 8 North of University Hospital." University Hospital has not attempted to argue that the location of this radiation spill was relevant to its liability in connection with that claim (*see* Defendant-Appellee's Answer Brief, at 11). Instead, it has argued that Instruction No. 22 is consistent with Dr. Craven's own, albeit mistaken testimony as to the location of that incident and is consistent with the language in Tendered Instruction No. 2 (*Id.*). Dr. Craven specifically raised this objection both during one of the instruction conferences before Instruction No. 22 was presented to the jury (Aple. App. 33-34) and in her post-trial motion (Aplt. App. 374). It was not necessary for Dr. Craven to have presented a written instruction containing language that the district court had stated that it would not provide to the jury. *Unit Drilling*, 108 F.3d at 1190 n. 5.

- Dr. Craven also has argued previously in this Court (Plaintiff-Appellant's Opening Brief, at 17) that subparagraph (1) of Instruction No. 22 also was erroneous in that it required the jury to find that Dr. Craven had reported to Dr. Hendrick all four of the items listed in that subparagraph in order to prevail on her First Amendment retaliation claim. While University Hospital has conceded that Dr. Craven raised this issue in a timely manner (Defendant-Appellee's Answer Brief, at 12), it argued that this instruction was not erroneous or prejudicial because it was consistent with Dr. Craven's own testimony. That begs the question of whether Dr. Craven had failed to establish that element of her claim if the jurors concluded, for example, that she had reported to Dr. Hendrick substantial concerns about the radiation spill, its adverse impact on patient care and overall hospital safety, and the unavailability of the radiation safety officer to attend to such emergencies, but that she had not proved by a preponderance of the evidence that she had reported to Dr. Hendrick substantial concerns about how that spill was handled. Any of those four items would have been sufficient to meet the *Connick* public concern test. Any of those items would have been sufficient to establish that she had engaged in conduct that was protected by the First Amendment. It was erroneous and highly prejudicial for the district court to have imposed on her the additional burden of proving that she had expressed her concerns to Dr. Hendrick about each one of those four items.

Each one of these errors is serious. Taken in combination, these errors require a reversal of the judgment entered against Dr. Craven on her First Amendment claim.

II. THE DISTRICT COURT ERRED IN CONCLUDING THAT UNIVERSITY HOSPITAL WAS NOT LIABLE ON DR. CRAVEN'S CLAIM OF TERMINATION OF EMPLOYMENT IN VIOLATION OF PUBLIC POLICY, ON THE GROUND THAT TERMINATION OF HER EMPLOYMENT DID NOT RESULT FROM THE OPERATION OF A PUBLIC HOSPITAL.

University Hospital concedes (Defendant-Appellee's Answer Brief, at 15), as it must, that the Colorado Court of Appeals has held that the provision of a secure area within a correctional facility is part of the "operation" of that facility as that term is defined in the Colorado Governmental Immunity Act (hereinafter, "CGIA"). *Flores v. Colo. Dept. of Corrections*, 1999 Colo. App. LEXIS 305 (Colo. App. 1999). Although University Hospital claimed that it was difficult to reconcile this case with that court's earlier decision in *Pack v. Arkansas Valley Correctional Facility*, 894 P.2d 34 (Colo. App. 1995), that court had no such difficulty. It noted that while the establishment and maintenance of a visitors' parking lot was merely ancillary to the purpose of a correctional facility, "under the circumstances of this case, the DOC [Department of Corrections] was exercising powers, duties, and functions vested in it by law with respect to the purpose of the facility." 1999 Colo. App. LEXIS 305, at *5. Specifically, "because the purpose of a correctional facility is to manage convicts safety and effectively, and visitation within the facility directly assists in meeting that purpose, the maintenance of the visitor area within the correctional facility here is directly related to the purpose of the correctional

facility." *Id.*, at **6-7.

University Hospital has cited two federal district court opinions in support of its position. Neither of those opinions supports that position. All that the district court decided in *Neiberger v. Hawkins*, 70 F.Supp.2d 1177, 1193-94 (D. Colo. 1999), was that a negligence claim based upon the defendants' alleged failure to comply with their statutory duty to provide for the treatment and cure of such persons as may become mentally ill clearly related to the purpose of the Colorado Mental Health Institute in Pueblo, "a public hospital" within the meaning of the CGIA. 70 F.Supp.2d 1194. That decision did not hold or even state "that sovereign immunity it waived only if the questioned activities relate to the hospital's purpose," as University Hospital has argued (Defendant-Appellee's Answer Brief at 16).

The district court's opinion in *Dobson v. City and County of Denver*, 81 F.Supp.2d 1080 (D. Colo. 1999), arose out of the murder of a security guard employed by the Denver Waste Water Management Division of the Department of Public Works by another employee of that agency, after the victim had submitted incident reports about threatening comments made by the perpetrator against him. 81 F.Supp.2d at 1080-83. The victim's mother and the personal representative of his estate brought state-law tort claims against the City and certain of its employees. Although the plaintiffs admitted that the defendants did not have a duty to the decedent to maintain a safe workplace, *Id.* at 1088, they argued that their claims were exempt from the CGIA because the decedent was killed allegedly as result of the defendants' failure to follow their internal personnel policies. *Id.* The district court found that the plaintiffs essentially were

contending that the defendants' "internal personnel policies established a standard of care prohibiting dangerous, work-related situations to exist -- i.e. a duty to provide a safe work environment." *Id.* The district court concluded "that maintaining a safe work environment by diligently following personnel policies is at best ancillary to the purpose of operating a sanitation facility and therefore barred by the GIA." *Id.* at 1089.

The mission of the University of Colorado Hospital Authority is "the operation of university hospital as a state of the art teaching and research hospital providing comprehensive medical care, including tertiary care, and patient care of limited availability." §23-21-504(1), C.R.S. Just as providing a secure area within a correctional facility for visitation is part of the "operation" of that facility, *Flores, supra*, Dr. Craven's job duties as the hospital's Safety Officer and Risk Manager directly assisted in meeting the statutory mission for University Hospital. Her claim that University Hospital terminated her employment "in retaliation for her refusal to accede to conduct that she reasonably believed to be contrary to a clearly expressed public policy relating to the public health, safety or welfare" (Aplt. App. 4) constituted an injury resulting from the "operation of [a] public hospital." §24-10-106(1)(b), C.R.S.

ORAL ARGUMENT STATEMENT

Dr. Craven requests oral argument in this case. Oral argument would significantly assist the decisional process, by enabling the parties to provide this Court with a clear understanding of the record resulting from the five-day jury trial and the legal issues involved in this case.

CONCLUSION

For the reasons stated herein, Dr. Craven submits that this Court should reverse the judgment entered by the district court on her First Amendment retaliation and public policy claims, and should remand this cause to the district court for a new trial on those claims.

Respectfully submitted,

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CERTIFICATE OF MAILING

The undersigned hereby certifies that, on the twenty-first day of August, 2000, a true and correct copy of the above and foregoing Plaintiff-Appellant's Reply Brief was deposited in the United states mail, postage prepaid, and addressed to:

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Supreme Court, U.S.
FILED
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CLERK

(2)

No. 01-889

In The

Supreme Court of the United States

PATRICIA S. CRAVEN,

Petitioner,

v.

UNIVERSITY OF COLORADO HOSPITAL AUTHORITY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an appellate court may affirm the judgment of a district court on any grounds that are supported in the record when the litigants have had a fair opportunity to develop the record?

I. STATEMENT OF THE CASE

Petitioner Patricia Craven (hereinafter "Craven") filed the subject action against Respondent University of Colorado Hospital Authority (hereinafter "University Hospital") asserting a claim for breach of implied contract, a claim for promissory estoppel, a 42 U.S.C. § 1983 claim for violation of her First Amendment rights, and a claim for wrongful discharge in violation of public policy. The claim for wrongful discharge in violation of public policy was dismissed upon summary judgment. The remaining claims proceeded to trial. At trial, University Hospital argued that Craven had been properly terminated for a number of performance problems, including, in particular, her difficulties in effectively interacting with co-employees [App. B to Petition for Writ of Certiorari at 18a-19a].

On May 17, 1999, the jury returned a verdict in favor of University Hospital and against Craven on her breach of implied contract and First Amendment claims. The trial judge then entered judgment in favor of University Hospital with respect to the promissory estoppel claim.

Subsequently, Craven appealed the First Amendment claim and the pendent state tort claim for wrongful discharge in violation of public policy to the Tenth Circuit Court of Appeals. Craven did not appeal either the breach of implied contract claim or the promissory estoppel claim to the Tenth Circuit Court of Appeals. The Tenth Circuit Court of Appeals affirmed the trial court results with respect to both the First Amendment claim and the claim for wrongful discharge in violation of public policy.

However, rather than addressing the alleged errors in the jury instruction on the First Amendment claim, which was the focus of Craven's appeal, the Tenth Circuit Court of Appeals affirmed the trial court on another basis. Specifically, the Tenth Circuit Court of Appeals held that Craven's First Amendment claim never should have been submitted to the jury as some of the items of speech at issue did not involve matters of public concern and because Dr. Craven's interests with respect to the remaining items did not outweigh the interests of University Hospital (citing *Pickering v. Board of Educ.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968)) [App. B to Petition for Writ of Certiorari at 15a-23a]. Craven then filed a Petition for Rehearing, which was denied by the Tenth Circuit of Appeals. This Petition for Writ of Certiorari followed seeking a review with respect to Craven's First Amendment claim. Craven is not pursuing an appeal of the pendent state tort claim for wrongful discharge in violation of public policy.

II. REASONS TO DENY WRIT

SUP. CT. R. 10 sets forth the standards for granting a writ of certiorari, which is a matter of judicial discretion and which may only be granted for compelling reasons. Craven has failed to identify any compelling reasons why the writ of certiorari should be granted in this case. Craven contends in her Petition for Writ of Certiorari that this Court should grant the writ of certiorari because the Tenth Circuit Court of Appeals departed from the accepted and usual course of judicial proceedings, thereby justifying an exercise of this Court's supervisory power.

However, the prevailing case law establishes that the Tenth Circuit Court of Appeals did not depart from the usual course of judicial proceedings; and thus, this Court's supervision is not required. Furthermore, Craven has failed to articulate any other compelling reasons why her Petition for Writ of Certiorari should be granted.

Specifically, in her Petition for Writ of Certiorari, Craven challenges the Tenth Circuit Court of Appeals' finding that the First Amendment claim should not have been submitted to the jury by the trial court because University Hospital did not raise that argument on appeal. Thus, Craven suggests that University Hospital waived this argument.

However, Craven's argument ignores the fact that University Hospital, throughout the course of the litigation, contested the protected status of the speech at issue. [App. B to Petition for Writ of Certiorari at 15a, n.7.] Moreover, since University Hospital was successful in its efforts to prevail at trial due to the favorable jury verdict and the trial judge's favorable ruling on the promissory estoppel claim, there was no reason for University Hospital to cross-appeal the trial court's decision to submit Craven's First Amendment claim to the jury.

There is case law addressing this very issue in the Tenth Circuit. In *Hernandez v. Starbuck*, 69 F.3d 1089, 1093 (10th Cir. 1995), the Court noted, "While the appellant challenges the district court's ruling, the appellee is only interested in maintaining the status quo, *i.e.*, an affirmance. Because the appellant comes to the court of appeals as the challenger, he bears the burden of demonstrating the alleged error and the precise relief sought. *Id.*

Appellees bear no such burden. *Id.* The *Hernandez* Court went on to hold that the distinction between appellant's and appellees' obligations under Rule 28 grows out of the court of appeals' freedom to affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied on by the district court." *Id.* This broad power to affirm extends beyond the counter-arguments raised by the appellee; it includes any ground for which there is record to support conclusions of law. *Id.*

A court of appeals may affirm on any ground adequately presented to the district court, as is the case herein where University Hospital, during the course of trial, continually challenged the protected status of Craven's speech. *See, Griffith v. Colorado, Div. of Youth Serv.*, 17 F.3d 1323, 1328 (10th Cir. 1994). Additionally, an appellate court may affirm the judgment of a district court on any grounds that find support in the record, provided the litigants have had a fair opportunity to develop the record, as was the case herein. *Seibert v. Oklahoma*, 867 F.2d 591, 597 (10th Cir. 1989) (citing *Blum v. Bacon*, 457 U.S. 132, 137, n.5, 102 S.Ct. 2355, 2359 n.5, 72 L.Ed.2d 728 (1982)). An appellate court is also not constrained by a trial court's conclusions, but may affirm the district court on any legal grounds supported by the record. *State Ins. Fund v. Ace Transp., Inc.*, 195 F.3d 561, 564 (10th Cir. 1999).

In summary, the usual course of judicial proceedings allows a court of appeals to affirm a trial court on any grounds supported in the record, whether or not those grounds were raised by an appellee on appeal. Significantly, Craven has cited no legal authority in her Petition for Writ of Certiorari which stands for the proposition

that it is inappropriate for a court of appeals to affirm a trial court on bases than those raised by the litigants.

Accordingly, Craven has failed to establish a departure from the usual course of judicial proceedings and legal precedent. For this reason, there is no basis for this Court to exercise supervisory power over the Tenth Circuit Court of Appeals under the circumstances presented in this case. Therefore, this Court should deny Craven's Petition for Writ of Certiorari.

Respectfully submitted,

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No. 01-889

In the Supreme Court of the United States

PATRICIA S. CRAVEN,

Petitioner,

v.

UNIVERSITY OF COLORADO HOSPITAL AUTHORITY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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QUESTION PRESENTED

Does a federal court of appeals impermissibly depart from the accepted and usual course of judicial proceedings by deciding an appeal on a ground not raised or argued by any of the parties in their appellate briefs?

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Patricia S. Craven respectfully submits this Reply Brief in support of her Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The University of Colorado Hospital Authority (hereinafter, "Authority") asserted in the brief it filed in opposition to the Petition for Writ of Certiorari in this case that, "rather than addressing the alleged errors in the jury instruction on the First Amendment claim, the Tenth Circuit Court of Appeals affirmed the trial court on another basis" (Reply Brief, at 2). That assertion is incorrect.

The Tenth Circuit *reversed* the district court's decision to submit Petitioner's claims to the jury. Specifically, that court concluded that none of the four categories of speech cited in Dr. Craven's opening brief in that court "can provide an adequate basis for her retaliatory discharge claim" (Pet. for Writ of Cert., App. B at 23a). After summarizing its more specific conclusions of law, that court then held:

> Accordingly, we hold that UH was entitled to judgment as a matter of law on Dr. Craven's § 1983 claim. *Because the § 1983 claim should never have been submitted to the jury*, the other five errors alleged in Dr. Craven's brief were harmless, and we need not address them.

(*Id.*) (emphasis supplied).

REASONS FOR GRANTING THE WRIT

The Authority's Brief is based entirely upon its contention that the Tenth Circuit has held that that court can

affirm a district court decision "on any grounds that find support in the record, provided the litigants have had a fair opportunity to develop the record ..." (Authority's Brief, at 4). The Authority claimed that Dr. Craven "has cited no legal authority in her Petition for Writ of Certiorari which stands for the proposition that it is inappropriate for a court of appeals to affirm a trial court on bases other than those raised by the litigants" (*Id.*, at 4-5). As a result, according to the Authority, Dr. Craven "has failed to establish a departure from the usual course of judicial proceedings and legal precedent," and therefore there is no basis for this Court to exercise its supervisory jurisdiction (*Id.*, at 5).

The Authority's argument fails to account for the fact that the Tenth Circuit in this case did not affirm the district court's decision on a ground other than that upon which that court relied. Instead, it reversed the district court's decision to submit Dr. Craven's First Amendment retaliatory discharge claim to the jury, and therefore held that any instructional errors alleged by Dr. Craven were harmless.

This is not a mere semantic distinction. In *Hernandez v. Starbuck*, 69 F.3d 1089, 1093-94 (10th Cir. 1995), *cert. denied*, 517 U.S. 1223 (1996) - a case upon which the Authority relied heavily - the Tenth Circuit distinguished among the roles of an appellant, an appellee and a court of appeals. While a court of appeals ordinarily will consider an argument not made by an appellant in that party's appellate briefs to be waived, "[a]ppellees bear no such burden." *Id.* at 1093. The court then reasoned:

> Though Fed. R. App. P. 28(b) requires the appellee's brief to contain arguments addressing the issues raised by the appellant, we have never characterized the appellee's

> obligation in terms of a categorical imperative. The distinction between appellant's and appellees' obligations under Rule 28 grows out of the court of appeals' freedom to affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court. This broad power to affirm extends beyond the counter-arguments raised by the appellee; it includes any ground for which there is record to support conclusions of law. Once the appellant alleges the district court erred, we have a duty to assess the validity of the appellant's allegations. This duty arises in part out of our relationship with the district court, and we may not neglect it simply because an appellee fails to defend adequately the district court's decision. *To do so would open the door to a perverse jurisprudence by which properly decided district court decisions could be reversed.*

Id. at 1093-94 (emphasis supplied; citations and internal quotation marks omitted).*

That court then used the facts in that case to demonstrate its point. It concluded that it should not reverse the district court's decision that the appellant had failed to exhaust state remedies with respect to his ineffective

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* The Authority did not quote the last two sentences from that paragraph, even though it quoted from portions of that paragraph that preceded those sentences.

assistance of counsel claim – a decision that the appellant had conceded to be correct – merely because the appellee had failed to make that argument on appeal. *Id.* at 1094. "Mr. Hernandez is asking us to reverse the district court while simultaneously conceding the court decided the issue properly. We cannot endorse a rule of law allowing such anomalous and contradictory results." *Id.*

This case presents precisely the opposite scenario. The Tenth Circuit did not hold that the district court's decisions on Dr. Craven's First Amendment retaliation claim were correct. Instead, the Tenth Circuit held that the district court had committed reversible error by submitting that claim to the jury. And it did so without advising the parties in advance that it would be considering that matter and without providing them an opportunity to address the legal issues upon which it decided its appeal concerning that claim.

Even assuming *arguendo* that the Tenth Circuit effectively affirmed the district court's decision in this case, that does not necessarily mean it followed the accepted and usual course of judicial proceedings. As that court held in one of the decisions the Authority cited, an appellate court can affirm a district court decision on any grounds that find support in the record if and only if "the litigants have had a fair opportunity to develop the record." *Seibert v. State of Okla., ex rel. Univ. of Okla. Health Sciences Ctr.*, 867 F.2d 591, 597 (10th Cir. 1989).

In each of the Tenth Circuit cases cited by the Authority, the parties had been provided with fair notice that that court could base its decision on the grounds upon which it eventually relied. In *Seibert*, that court decided the legal merits of the plaintiff's claim for relief in an appeal from a decision dismissing that claim. *Id.* at 596-97. In *Griffith v.*

State of Colo., Div. of Youth Svces., 17 F.3d 1323, 1328 (10th Cir. 1994), that court affirmed the district court's decision not to award attorney fees to a prevailing party in a Title VII case on the basis of this Court's decision in *Farrar v. Hobby*, 526 U.S. 103 (1992), after the parties had been given an opportunity to address *Farrar* in their appellate briefs. And in *State Ins. Fund v. Ace Transp. Inc.*, 195 F.3d 561, 564 (10th Cir. 1999), it is not even clear that the Tenth Circuit affirmed the district court's decision on a ground not raised on appeal. Instead, that court affirmed the district court's conclusion that the Fund's one-third rule applied to the owner-operator arrangement described in that case, *Id.* at 565-66, but reversed the district court's decision about how that rule had been calculated for that defendant. *Id.* at 566-67.

Similarly, in *Blum v. Bacon*, 457 U.S. 132 (1982), this Court affirmed a decision by the Second Circuit which had invalidated provisions in the New York State Emergency Assistance Program on constitutional grounds. *See id.* at 136. This Court's affirmance, however, was based on statutory grounds, *Id.* at 139-45, even though the respondent had not made a statutory argument in this Court. *Id.* at 137 n. 5. In doing so, this Court noted that the statutory issue had been raised and decided in both the district court and in the court of appeals.

The grounds upon which this Court affirmed the Second Circuit in *Blum*, and the grounds upon which the Tenth Circuit affirmed the district court decisions in the cases cited by the Authority, all were subsumed within the arguments the parties had raised on appeal. That practice is well accepted in our jurisprudence, and does not offend fundamental principles of due process. If a lower court has decided a legal issue correctly, albeit for the wrong reason, an

appellate court has the authority to affirm that decision on a ground not raised by the appellee.

What happened here is that the parties had filed extensive summary judgment briefs on whether Dr. Craven's speech involved matters of public concern and on whether the balancing test this Court established in *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), favored the Authority or Dr. Craven. The parties did not submit those briefs to the Tenth Circuit in the appendices to their appellate briefs. Instead, the court of appeals had only the oral arguments the parties made to the district court when the Authority raised those issues in its motions for judgment as a matter of law during the trial. And it had a copy of the full trial court transcript only because the Tenth Circuit has held that a party must file the complete trial transcript in order for that court to review an argument of instructional error. *Morrison Knudsen Corp. v. Fireman's Fund Ins. Co.*, 175 F.3d 1221, 1237-38 (10th Cir. 1999).

Dr. Craven did not have a "a fair opportunity to develop the record," *Seibert*, 867 F.2d at 597, in the court of appeals. She could not reasonably have anticipated that that court would search the trial transcript, submitted for a totally different reason, for a basis to reverse the district court on an issue neither of the parties had raised or briefed on appeal. The Authority has cited no case in which the Tenth Circuit, or for that matter any other appellate court in this country, has decided a case by that technique. This Court should exercise its supervisory authority to review the Tenth Circuit's abuse of and disregard for standard and accepted appellate practices in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

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